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84-1581

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

SEALY, INCORPORATED, ET AL.,

Petitioners,

v.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is a claim under the antitrust laws which has been merged in a satisfied judgment in favor of plaintiffs barred by *res judicata* or may it be revived for additional damages simply because it is joined with claims for acts occurring subsequent to those previously adjudicated?

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QUESTION PRESENTED

Is a claim under the antitrust laws which has been merged in a satisfied judgment in favor of plaintiffs barred by *res judicata* or may it be revived for additional damages simply because it is joined with claims for acts occurring subsequent to those previously adjudicated?

STATUTE INVOLVED

Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15, provides in pertinent part: "[A]ny person who shall be injured in his business or property by anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained . . . ."

STATEMENT

In 1971, the Respondents (Ohio) filed an antitrust action against Petitioners (Sealy) alleging, *inter alia*, that Sealy had wrongfully denied Ohio the acquisition of certain specified franchises which Sealy had acquired for itself. (*Ohio I.*) Ohio sought treble damages for the loss of profits it would have made had it not been denied the franchises and asked for equitable relief in the form of a decree divesting Sealy of the franchises in question. In April of 1975, after a lengthy trial, a jury returned a verdict of $6.8 million in favor of Ohio for these antitrust violations. In April of 1976, a motion for a new trial was denied on the condition of a 50% remittitur, to which Ohio acceded. Ohio thus received trebled damages in a judgment exceeding $13 million, including interest. Eight months after the denial of a new trial, the district court entered a judgment denying the equitable relief sought by Ohio.

The damage award was affirmed on appeal in 1978. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). The judgment was satisfied by the payment to Ohio of more than $13 million. But the Seventh Circuit remanded the case to the trial court

for reconsideration of its denial of equitable relief. After taking additional evidence on remand, the district court ruled that divestiture of the franchises acquired by Sealy and denied to Ohio would be unwarranted. The Seventh Circuit affirmed this ruling of the district court. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982).

Meanwhile, in March of 1976, Ohio filed this second antitrust action against Sealy (*Ohio II*), in which it realleged, *inter alia*, the same facts about the denial of the franchises to Ohio by Sealy and again sought as damages the lost profits resulting therefrom. Sealy moved for partial summary judgment on the ground that Ohio's claim for damages for its failure to obtain the franchises in question had already been litigated and was, therefore, merged in the first judgment. The district court granted the motion for partial summary judgment, on the ground that the damages caused by Sealy's failure to transfer the franchises were among those that had been or could have been litigated in *Ohio I*. *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11, 14-20 (N.D.Ill. 1980).

On appeal, the Seventh Circuit reversed on the basis of a novel theory of its own creation. It held that, although it was true that Ohio's claim for lost profits from the failure to acquire the franchises had been raised and adjudicated in *Ohio I*, the original damage claims for non-acquisition could be revived because the same claim had been joined in *Ohio II* with other alleged antitrust violations occurring subsequent to the verdict in *Ohio I*. The Court of Appeals did not deny that Ohio had already been awarded damages for the lost profits resulting from Sealy's acts in denying the franchises to Ohio.

Petitioners made a timely motion for rehearing and requested rehearing *en banc* because of the novelty of the Court of Appeals' ruling, because it was inconsistent with this Court's announced principles of *res judicata* in antitrust cases, and because it was in conflict with rulings of other Circuits. Rehearing was denied on February 8, 1985.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS CREATED A NOVEL DOCTRINE OF MAJOR SIGNIFICANCE WHICH IS IN CONFLICT WITH THE PRINCIPLES OF *RES JUDICATA* LONG ESTABLISHED AND REITERATED IN DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

Antitrust litigation is a major burden on the resources of federal courts. Each antitrust case now takes an inordinate amount of time in pre-trial discovery, pre-trial motions, extensive trials, post-trial motions and long drawn-out appeals. These cases represent a major factor in the clogging of federal court dockets, especially in courts located in districts most heavily burdened with cases. For this reason alone, the importance of the principles underlying the rules of *res judicata*, which seek to bring litigation to a conclusion by a final judgment on the merits, has particular cogency in the area of antitrust law. In fact, however, there is nothing in the reasoning of the opinion below that would confine it to antitrust cases. Indeed, it affords promise of a means for reopening any and every judgment entered in a federal court.

The notion that a plaintiff may recover a second time against the same defendant for the same wrongful act for which he has already been compensated, because he joins his adjudicated claim with a subsequent one, is a novel doctrine created by the Court below.[1] It is a pernicious proposition making of every antitrust judgment a phoenix which will rise from its own ashes each time a plaintiff seeks to revive a barred claim simply by joining it in a new complaint with claims not barred. And, of course, if the ruling of the Court below is appropriate with regard to a judgment in which plaintiff prevailed, it must be equally appropriate, if not *a*

1. The district court had carefully examined and rejected each of the theories advanced by plaintiff for escaping the bar of *res judicata*. See Appendix B, *infra*, pp. 5-17.

fortiori, where the plaintiff has failed in his first effort. The Seventh Circuit has not only created a phoenix, but in Christopher Fry's terms: "A Phoenix Too Frequent." The doctrine is dangerous and destructive and should be put down as soon as possible.

In *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), this Court recently rejected an attempt by the Ninth Circuit to "create[ ] an exception to the doctrine of res judicata" in an antitrust case. *Id.* at 395. It should do the same here. As this Court stated in *Moitie*:

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. [*Id.* at 398.]

The Court continued:

> In this case, the Court of Appeals conceded that the "strict application of the doctrine of *res judicata*" required that *Brown II* be dismissed. By that, the court presumably meant that the "technical elements" of res judicata had been satisfied, namely, that the decision in *Brown I* was a final judgment on the merits and involved the same claims and the same parties as *Brown II*. . . . We believe that such an unprecedented departure from accepted principles of res judicata is unwarranted. . . . [*Id.* at 399.]
>
> . . . There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946). The Court of

> Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Assn.*, 283 U.S. 522, 525 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . . " *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets . . . . *Reed* v. *Allen*, 286 U.S. [191] at 198-199. [*Id.* at 401-402.]

There can be little doubt that the Court of Appeals below has rejected this Court's rulings on *res judicata* as epitomized in *Moitie*.

Indeed, the Seventh Circuit in this case turned its back on its own rulings, made in the context of statutes of limitations, that a moribund claim cannot be revived by joining it with a live one. *See, e.g., Emich Motors Corp.* v. *General Motors Corp.*, 229 F.2d 714 (7th Cir. 1956); *Weber* v. *Consumers Digest, Inc.*, 440 F.2d 729 (7th Cir. 1971); *2361 State Corp.* v. *Sealy, Inc.*, 402 F.2d 370 (7th Cir. 1968). In that same context, other Circuits have made it clear that barred causes of action are not revivable simply by adding allegations of fresh claims. *See, e.g., Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F.2d 1029 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977); *City of El Paso* v. *Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert.*

denied, 439 U.S. 1121 (1979); *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *David Orgell, Inc.* v. *Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981).

The antitrust laws provide for treble damages to a person injured by their violation; they do not provide such a person with the right to litigate four successive suits on the same claim.[2] It matters not how villainous the defendant may be depicted or how virtous the plaintiff may be painted. The true rule of *res judicata* and the reasons for it were plainly set out in *Moitie*. Its correct application to an antitrust claim based on adjudicated past acts is clearly indicated by this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), where this Court, referring to a "continuing conspiracy to violate the antitrust laws," said:

> Generally, a cause of action accrues . . . when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act. . . . Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date *and all provable damages that will flow in the future from the acts of the conspirators on that date*. [*Id.* at 338-39. Emphasis added.]

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2. In addition to the instant suit (*Ohio II*), plaintiff has already filed two additional suits (*Ohio III* and *Ohio IV*) in which it also seeks further damages for the claims adjudicated in *Ohio I*. These actions are pending in the district court. *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, Civil Action No. 79 C 2741 (N.D.Ill. 1979); *Ohio-Sealy Mattress Mfg. Co.* v. *Haas*, Civil Action No. 82 C 2488 (N.D.Ill. 1982).

Here, pre-verdict conduct for which plaintiff has already been compensated has been held to justify a second claim on the same facts for further compensation. There is no warrant of authority for such a gross deviation from the established law. The Seventh Circuit ought not to be allowed to open the floodgates of relitigation as it will have done if the decision below is allowed to stand.

CONCLUSION

For the reasons heretofore established, we respectfully pray that this Court grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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Dated: April 5, 1985.

Statement in Compliance With Rules 21.1(b) and 28.1

Petitioners Sealy, Incorporated, Morris A. Kaplan, Sealy Mattress Company of Illinois, William H. Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Company, Morton H. Yulman, Sealy of Eastern New York, Inc., Sealy of Minnesota, Inc., T.C. Englehardt, Jr., Fred G. Hodges Bedding Company (a/k/a Sealy Mattress Company of Reading, PA), Joseph R. Rudick, Maryland Bedding Company, Howard G. Haas, Sealy Spring Corporation, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., and respondents Ohio-Sealy Mattress Manufacturing Company, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy Mattress Company of Fort Worth, Sealy of the Northeast, and Sealy Mattress Company of Georgia, were parties to the proceedings in the Court of Appeals.

Since the filing of this lawsuit Sealy Spring Corporation has been merged into Sealy, Incorporated. Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc. have been merged into Sealy Mattress Manufacturing Company, Inc., a wholly-owned subsidiary of Sealy, Incorporated.

Petitioners have no parent companies, affiliates or subsidiaries other than wholly-owned subsidiaries.

Nos. 83-2321 & 83-2405

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF FORT WORTH, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, AND SEALY MATTRESS COMPANY OF GEORGIA,

Plaintiffs-Appellants,

v.

MORRIS A. KAPLAN, SEALY MATTRESS COMPANY OF ILLINOIS, WILLIAM H. WALZER, SEALY CONNECTICUT, INC., SEALY GREATER NEW YORK, INC., WATERBURY MATTRESS COMPANY, MORTON H. YULMAN, SEALY OF EASTERN NEW YORK, INC., SEALY OF MINNESOTA, INC., PETER D. BROWN, SEALY MATTRESS COMPANY OF MICHIGAN, INC., T. C. ENGLEHARDT, JR., FRED G. HODGES BEDDING COMPANY (A/K/A SEALY MATTRESS COMPANY OF READING, PA), SEALY OF DES MOINES, INC., WALTER HERTZ, SEALY MATTRESS COMPANY OF NEW JERSEY, INC., JOSEPH V. MOFFITT, SEALY OF THE CAROLINAS, PEERLESS MATTRESS COMPANY, LLOYD B. ROSENFELD, SEALY MATTRESS COMPANY OF OREGON, JOSEPH R. RUDICK, MARYLAND BEDDING COMPANY, JAMES THOMPSON, HOWARD G. HAAS, SEALY, INCORPORATED, SEALY SPRING CORPORATION, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF ARIZONA, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., AND SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 810 — William T. Hart, *Judge*.

ARGUED APRIL 19, 1984 — DECIDED SEPTEMBER 21, 1984

Before PELL and WOOD, *Circuit Judges*, and WEIGEL, *Senior District Judge.*[*]

PELL, *Circuit Judge.* This case which, for purposes of clarity, we shall label *Ohio II*, is the second of six civil suits brought by the Ohio-Sealy Mattress Manufacturing Company (Ohio) against its licensor, Sealy, Incorporated (Sealy), and other defendants. The first civil suit, which we shall label *Ohio I*, was filed in 1971, and, following two appeals to this court, ultimately resulted in Ohio's obtaining a substantial damages award as well as an order of equitable relief.[1] The present appeal in *Ohio II* is taken from two orders of the district court entered on August 1, 1980, and June 16, 1983. The appeal, involving two challenging questions regarding the doctrine of res judicata, requires us to determine the preclusive effects of the *Ohio I* litigation on the *Ohio II* case.

I. FACTS

Both *Ohio I* and *Ohio II* are antitrust suits brought by Ohio, one of the most successful and aggressive licensees of appellee Sealy, which owns numerous trademarks to a popular brand of mattresses and other bedding products. The resolution of this appeal makes necessary our examination of the procedural history of each suit.

A. The *Ohio I* litigation[2]

Ohio I, a marathon case which, from the filing of the complaint to its final disposition on appeal, lasted over one decade, had its origins in a 1967 Supreme Court case *United States* v. *Sealy, Inc.*, 388 U.S. 356 (1967). In *United States* v.

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* Stanley A. Weigel, Senior District Judge of the Northern District of California, sitting by designation.

1. When we use the terms "Ohio I," "Ohio II," and "Ohio III" in this opinion, we refer to entire lawsuits, not to the successive occasions a particular cause of action has been before this court.

2. Much of this discussion is derived from much of this court's opinion in *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

Sealy, Inc., the Supreme Court invalidated Sealy's system of allocating mutually exclusive manufacturing and sales territories to its manufacturer-licensees. The Court found that Sealy was a joint venture of its stockholder-licensees and that the licensees were "themselves directly, without even the semblance of insulation, in charge of Sealy's operations." *Id.* at 353. Sealy's system of assigning each manufacturer an enclave free of intrabrand competition, the Court held, was therefore a *horizontal* market allocation per se violative of Section 1 of the Sherman Act.[3] Approximately four weeks after the Court handed down its decision, the licensee-directors of Sealy met to discuss the ramifications of the Court's ruling. Concern was expressed over the competition that could be expected from "renegade," "out of control," and "predatory" licensees no longer constrained by the exclusive territory system. Sealy thereafter developed a new Uniform License Agreement that all its licensees signed in 1968, save one whose license was reacquired by Sealy some years later. The new agreement preserved the same territories (designated Areas of Primary Responsibility or "APRs") as had been used before, and Sealy agreed not to permit any other manufacturer to produce Sealy products in a licensee's territory. The Agreement was thus exclusive as to manufacture, but it was not on its face exclusive as to sales. A licensee was permitted to sell Sealy products in another licensee's APR. Any licensee who would be inclined to sell outside his own APR, however, faced several disincentives. First, each licensee was held accountable for adequate sales in his APR. As an incentive to sell only within his APR, each licensee, once he achieved a quota of sales in his APR, had to pay only one-half the standard royalty to Sealy for all subsequent sales of Sealy products made that year inside or outside his APR. Second,

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3. The *Sealy* Court dealt with an aggregate of trade restraints, including horizontal market allocation as well as minimum retail price fixing. In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), the Supreme Court removed the ambiguity created by *Sealy;* the *Topco* Court held that horizontal territorial restraints even if unaccompanied by price fixing are considered per se illegal. 405 U.S. at 609 & n.9.

there was a surcharge placed on sales outside a licensee's APR. The surcharge was termed a "passover payment," and the seller had to remit it to Sealy, which in turn paid it over to the licensee in whose territory the seller had successfully marketed his product. Although Sealy characterized the payment as one designed to prevent an out-of-APR licensee from taking a "free ride" on a fellow licensee's advertising efforts, Sealy itself conducted the great bulk of the advertising for the Sealy brand. The passover charge could run as high as eleven percent. Third, a licensee making an out-of-APR sale had to pay a one percent "product service repair" charge to Sealy. As originally conceived, Sealy was to hold these payments in a fund from which it would reimburse licensees who actually made repairs on products they had not sold, but in practice Sealy paid the charges over to "invaded licensees" whether or not they in fact made any repairs. Fourth and finally, the 1968 Uniform License Agreement limited a licensee to manufacture Sealy products at specified plant locations and prohibited the adding of plant locations without Sealy's written approval. A licensee contemplating an out-of-APR sale faced high transportation costs because of the bulk and weight of the product, and the plant location clause exacerbated this impediment to competition. A licensee who wanted to locate a plant at the periphery of his APR in order to compete more effectively against his neighboring licensees was prevented from so doing. Ohio twice sought permission to construct a plant in Toledo, Ohio, in order to compete more effectively against the Detroit licensee. On both occasions, Sealy denied Ohio's request.

Sealy also inserted into the Uniform License Agreement a clause giving Sealy the "right of first refusal" should a licensee desire to sell his business. Sealy exercised this clause against Ohio on three occasions between 1970 and 1972, thereby blocking Ohio's efforts to obtain the Philadelphia, Florida, and Pittsburgh licensees. In 1970, Ohio contracted to buy the Philadelphia licensee, but upon a complaint from the neighboring Baltimore licensee, Sealy exercised the right of first refusal and the Philadelphia licensee retracted its offer

to sell. In 1972, the same sequence of events took place, but this time Sealy acquired the Philadelphia licensee. In 1970, the principal of the Florida licensee reached an agreement to transfer his business to Ohio, but he withdrew his business from sale after Sealy exercised its right of first refusal. In 1972, Ohio for a second time contracted to buy the Florida licensee but Sealy exercised its right of first refusal and acquired the Florida concern. A similar scenario was played out with respect to the Pittsburgh licensee in 1972 and 1973.

In 1971, Ohio and four wholly owned subsidiaries brought suit against Sealy and other defendants seeking both damages and injunctive relief. The claims in the complaint fell largely into two categories. First, there were claims related to the post-1967 market allocation we have just described. Second, there were claims based upon Sealy's use of tying arrangements with respect to bedding components. The latter category of claims need not concern us further. With respect to the former category of claims, Ohio sought the following: First, it requested recovery of the passover payments and product service repair charges it had remitted to Sealy, plus an injunction against future imposition of those charges. Second, Ohio sought damages based upon Sealy's refusal to allow it to locate a plant in Toledo, plus an injunction against future enforcement of the plant location clause. Third, it requested lost profits and preparatory expenses with respect to the failed acquisitions of the Philadelphia, Florida, and Pittsburgh licensees, plus divestiture by Sealy of those licensees. Finally, Ohio sought an injunction against future enforcement of the exclusive manufacturing territories provision. Following extensive pre-trial discovery, the damages claim was tried to a jury, and in April 1975 the jury returned a general verdict in excess of six million dollars in favor of Ohio.

Approximately one year after the general verdict of April 1975, district court Judge Parsons denied Sealy's motion for a new trial upon the condition that Ohio accept a fifty percent remittitur. Ohio acceded to the remittitur and thus, after trebling, received damages in excess of ten million dollars.

Eight months later, Judge Parsons denied Ohio equitable relief.

Ohio I came to this Court for the first time on appeal in 1978. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). Sealy argued on appeal that there was insufficient evidence upon which the jury could have found a system of market allocation. We agreed with Sealy that the enormity of the damages award necessarily implied the jury had found that Sealy had allocated the market and had thereby perpetuated the horizontal constraints the Supreme Court in 1967 found per se violative of the Sherman Act. We disagreed, however, with Sealy's assertion that the evidence adduced at trial was insufficient to support such a finding. Although any one of the license provisions Sealy used may not have effected a horizontal market allocation, the evidence of all of the provisions taken together, combined with the fact that most directors of Sealy were licensees, entitled the district court to let the jury decide whether Sealy had illegally divided the market. We reversed the district court, however, with respect to the denial of injunctive relief. We reasoned that the district court had failed to apprehend the jury's necessary finding that Sealy had effected a market allocation: "We think the court erred, thus, in premising its equitable relief decision on the assumption that the only fact established by the jury verdict was that at least one acquisition somehow violated the antitrust laws. Under the evidence and the instructions, and as the case was argued, the jury verdict must also be read to include a finding that Sealy was engaged in the scheme of market allocation in which one or more acquisitions were at least a part." *Id.* at 844. We thus remanded the case to Judge Parsons with instructions to reconsider the denial of equitable relief. We directed Judge Parsons to consider what "total mix of equitable relief, if any, might be just in the circumstances." *Id.* at 845 & n.34. We also directed Judge Parsons to "consider the evidence adduced both at the jury trial and at the equitable relief hearing," and we permitted

him to "take any additional evidence . . . [he] might find helpful." *Id.* at 845.

On remand, the district court took additional evidence from the parties and concluded those evidentiary proceedings in 1979. In March of 1981, Judge Parsons entered a final decree, in which he stated at the outset that Sealy had voluntarily agreed to cease collecting passover payments, enforcing the plant location clause, or collecting product service repair charges. Judge Parsons then stated that he had decided not to enjoin Sealy from future enforcement of the exclusive manufacturing territories provision. Judge Parsons reasoned that permitting any licensee to open a plant anywhere in the nation would amount to appropriation of the licensor's property. He also stated that his enjoining enforcement of the plant location clause and collection of the surcharges on out-of-APR sales was a measure sufficient to end market allocation. Judge Parsons declined to enjoin the exercise of the right of first refusal unless Sealy's exercise were linked to an anti-competitive purpose. Judge Parsons reasoned that Sealy had a protectible interest in maintaining the quality of products bearing the Sealy label, and that the right of first refusal, if not used for anti-competitive purposes, effected legitimate control over the identity of those who manufacture under the Sealy name. Next, Judge Parsons concluded that divestiture of the Pittsburgh, Florida, and Philadelphia licensees was not required. Finally, Judge Parsons denied Ohio's supplemental motion to recover damages that had accrued since the jury verdict. Judge Parsons reasoned that Ohio had pending at that time two lawsuits in which it sought to recover those supplemental damages.

Ohio appealed from the final decree, arguing that Judge Parsons erred when he failed to (1) enjoin the exercise of the exclusive manufacturing clause, (2) order divestiture, and (3) award supplemental damages. *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982). This court affirmed Judge Parsons on each point. We began our opinion by noting that an

equitable decree in a private antitrust suit should fashion "injunctive relief only to the extent necessary to protect [the plaintiff] from future damages likely to occur if the defendant continues the unlawful antitrust conduct." *Id.* at 495. We then considered the denial of injunctive relief with respect to the exclusive manufacturing territories provision and concluded that the district court's other injunctive relief was sufficient to restore "significant intrabrand competition among neighboring licensees." *Id.* at 496. Although the exclusive manufacturing territories provision might prevent Ohio from competing effectively in every APR, we stated that Ohio was not entitled to secure by injunctive relief every conceivable competitive goal. *Id.* On the issue of divestiture, we noted that Ohio had acquired two licensees near the APRs of the Philadelphia and Florida licensees. We also stated that Ohio's Medina, Ohio, plant was near the Pittsburgh licensee's APR. We therefore concluded that Ohio-Sealy could engage in significant intrabrand competition at those locations and that divestiture was accordingly unnecessary. Finally, we agreed with the district court that Ohio was not entitled to supplemental damages. With respect to supplemental damages resulting from Sealy's pre-verdict conduct, we divided the damages into two types, namely those that were provable at trial and those that were not. We stated that the doctine of res judicata barred Ohio from recovering damages of the first type in any further *Ohio I* proceeding or in any subsequent lawsuit. We concluded that Ohio was, however, entitled to bring a fresh cause of action in a separate lawsuit to recover damages of the second type. Finally, with respect to any damages issuing from Sealy's post-verdict conduct, Ohio again had an independent cause of action that it could pursue in a separate suit.

B. The *Ohio II* Litigation

In March 1976, Ohio and five wholly owned manufacturing subsidiaries filed a new suit naming as defendants, *inter alia*, Sealy, certain Sealy subsidiaries, Sealy's president, and several former members of Sealy's Board of Directors. The

complaint was in six counts. Count I was brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and sought damages and injunctive relief for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Distilled to its simplest elements, Count I alleged that all the practices upon which the jury based its 1975 verdict continued without change after 1975. In particular, the complaint alleged that Sealy had reenacted the Uniform License Agreement, reelected the licensee directors to Sealy's board, collected passover and product service repair charges, and "excluded Ohio from competing effectively in the Florida, Philadelphia, and Pittsburgh markets." Paragraph 92 of Count I contained the damages prayer, and it read in pertinent part:

> 92. Ohio-Sealy's injury by reason of all said unlawful restraints and activities has manifested itself in damages, including the following:
>
> (a) Lost profits in connection with the loss of the acquisition of the Florida, Philadelphia, and Pittsburgh licensees.
>
> (b) Loss of profits and increased costs of doing business in connection with refusals of a Toledo plant location in 1971 and 1973.
>
> (c) Royalties paid on bedding not bearing Sealy trademarks and trade names.
>
> (d) Net passover payments and warranty repair charges made by Ohio-Sealy.

Count II sought damages and injunctive relief under Section 8 of the Clayton Act, 15 U.S.C. § 19, and alleged that certain individuals were at the same time directors of licensees and directors of Sealy, Inc. Paragraph 104 of the complaint, the damages prayer for Count II, stated that as a direct result of the interlocking directorate, Ohio had been injured and would continue to be injured "as set forth in Count I." Counts III through VI alleged numerous additional

violations of federal law as well as state law, but these matters have now been settled or adjudicated, and none is relevant to this appeal.

In July 1979, Ohio filed a third suit, *Ohio III*, against Sealy and certain new directors. Sealy and the other defendants in *Ohio III* filed a motion to abate the action as duplicative of *Ohio II*. In response to that motion, Ohio amended its complaint in *Ohio II*, limiting the temporal scope of that complaint to the period before April 24, 1978. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 90 F.R.D. 40 (N.D. Ill. 1980). Sealy and the district court agreed to that time limitation.

Only three matters are presently before this court on appeal, namely the damages prayers of subparagraphs 92(a) and 92(b) and a request under Count II to enjoin enforcement of the exclusive manufacturing territories provision. The prayer under subparagraph 92(c) was adjudicated below and this court affirmed the district court's decision on interlocutory appeal. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 712 F.2d 270 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983). With respect to the prayer under subparagraph 92(d), Ohio agreed below that it was foreclosed by the judgment in *Ohio I* from seeking recovery of payments made before the 1975 jury verdict. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 90 F.R.D. 11, 14 & n.6 (N.D. Ill. 1980). As to payments made after the 1975 verdict and before April 24, 1978, the defendants in *Ohio II* tendered treble the amount of the payments and the district court dismissed the prayer. With respect to injunctive relief under Count II, Sealy acceded to an injunction against the interlocking directorate, which left only the request for an injunction against enforcement of the exclusive manufacturing territories provision.

By order dated August 1, 1980, district court Judge Aspen granted Sealy summary judgment with respect to the damages Ohio sought under subparagraphs 92(a) and 92(b). Judge Aspen reasoned that Ohio sought post-verdict damages resulting from pre-verdict acts, and that Ohio could have

established those damages at trial in 1975 by projecting them into the future and discounting them to present value. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 90 F.R.D. 11, 17 (N.D. Ill. 1980). Hence, principles of res judicata barred Ohio from recovering post-verdict damages from Sealy, Inc. Judge Aspen also stated that principles of satisfaction of judgment barred Ohio from recovering post-verdict damages from the other defendants in *Ohio II*.

In May 1982, *Ohio II* was reassigned to District Judge William Hart. On June 16, 1983, Judge Hart ruled in an unpublished order that principles of res judicata also barred Ohio from obtaining an injunction in *Ohio II* against enforcement of the exclusive manufacturing territories provision. Judge Hart reasoned that in our opinion in the second appeal from *Ohio I*, this court had directed Judge Parsons to take all the additional evidence he needed to fashion equitable relief. In 1979, Judge Parsons in fact held an evidentiary hearing and invited the parties to submit to him evidence concerning post-verdict events that might bear on Ohio's prayer for equitable relief. In March 1981, Judge Parsons entered his final decree. Since Ohio had limited the time period of *Ohio II* to acts occurring before April 24, 1978, all facts relevant to the prayer for equitable relief in *Ohio II* were or could have been litigated before Judge Parsons. This court affirmed Judge Parsons' decree in 1982, and hence, Judge Hart maintained, the matter of enjoining enforcement of the exclusive manufacturing territories provision had been fully and finally adjudicated in *Ohio I*.

With the entry of Judge Hart's June 16, 1983, order, all claims in *Ohio II* had been dismissed, rendered moot, or settled. Final judgment was entered on June 30, 1983. Ohio now appeals from Judge Aspen's order of August 1, 1980, and Judge Hart's order of June 16, 1983.

II. DISCUSSION

A. Judge Aspen's August 1, 1980, Order

By order of August 1, 1980, Judge Aspen decided that Ohio's damages claim for the post-verdict consequences of the defendants' pre-verdict acts was barred by res judicata. Ohio assigns error to this point. Our resolution of Ohio's appeal requires us to examine the law of res judicata in the context of a continuing conspiracy to violate the antitrust laws.

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the Supreme Court articulated the legal principles applicable to the recovery of damages resulting from ongoing conduct violative of the antitrust laws. The Court first stated that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act." *Id.* at 338. Under this rule, Ohio had the right to seek post-verdict damages from Sealy's post-verdict acts. For example, when Sealy continued after the 1975 verdict to collect passover and product service repair charges, a new cause of action to recover those payments accrued to Ohio. *See Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 327-28 (1955); *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 126-29 (5th Cir. 1975). Sealy does not contest that Ohio had such a right, and the claim for Ohio's post-verdict payments has in any event been resolved by settlement. The Court next stated that "each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Id.* at 338-39. It is under this rule, Sealy contends, that Ohio is not entitled to recover in *Ohio II* the damages described in subparagraphs 92(a) and 92(b). The acquisitions of the Philadelphia, Florida, and Pittsburgh licensees as well as the denial of the Toledo, Ohio, plant location all occurred prior to the

jury's verdict in 1975. Ohio was required to argue to the jurors sitting in *Ohio I* that it would incur damages into the future from the acts described in subparagraphs 92(a) and 92(b). Ohio's failure to make such an argument to the jurors sitting in *Ohio I* bars it forever from recovering the post-verdict damages it has suffered because of the acquisitions and denial of a new plant location. The Court placed a proviso on its second rule but Sealy maintains that even considering the proviso, Ohio is still barred. The proviso stated, "[I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id.* at 339. In his August 1, 1980 decision, Judge Aspen considered whether the post-verdict damages Ohio sought in *Ohio II* might indeed be recoverable because the fact of their accrual was "speculative" or their amount "unprovable" at trial in 1975. In a carefully crafted opinion, Judge Aspen ruled that neither standard articulated in the *Zenith* proviso could save Ohio's claim for damages. The possibility of future damages was not so speculative as to preclude presentation to the jury. Ohio knew that Sealy would not simply yield up the Philadelphia, Florida, and Pittsburgh licensees in the event of an unfavorable jury verdict. Sealy would continue to retain those licensees and hence recovery of future damages was an issue ripe for presentation to the jury in 1975. Although Ohio had chosen to seek equitable relief, including divestiture, in a later proceeding, the prospect of equitable relief did not render speculative the accrual of future damages under the *Zenith* proviso. Plaintiff, by his own actions, could not "create speculativeness, and then use that uncertainty as to future damages to avoid the policies underlying res judicata." *Ohio-Sealy Mattress Manufacturing Co.* v. *Kaplan*, 90 F.R.D. 11, 17 (N.D. Ill. 1980). Moreover, the future damages that Ohio sought in *Ohio I* were capable of proof at trial in 1975 under well established methods of projecting lost profits. There is "broad latitude" in establishing antitrust damages in private suits,

and although Ohio could not establish damages with "mathematical certainty," it had at its disposal the tools lawyers generally employ to make a just and reasonable estimate of future losses. *Id., citing Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976).

We are unable to agree with Judge Aspen's conclusion that Ohio is barred in *Ohio II* from recovering post-verdict damages resulting from Sealy's pre-verdict conduct. The accrual of future damages resulting from the acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and the denial of a Toledo plant was speculative at the time of the 1975 jury verdict. In order to explain our position, it is necessary to elaborate on that part of our 1978 affirmance of *Ohio I* that discusses the Supreme Court's then recently announced decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *See Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821, 831-33 (7th Cir. 1978).

In *Brunswick*, the Court addressed the requirements for recovery of treble damages under Section IV of the Clayton Act, 15 U.S.C. § 15. Petitioner was a large national manufacturer of pinsetting equipment that had acquired several bowling centers after those centers defaulted on the obligations they had issued to purchase the manufacturer's pinsetting products. Respondents were bowling centers that competed with the centers petitioner acquired. At trial, respondents tried to establish damages compensable under Section IV solely by showing that their profits would have increased had petitioner not kept the defaulting centers in business. The Court assumed for purposes of the case that petitioner's entry into a market of small concerns violated Section VII, which proscribes acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The Court held that respondents were not entitled to damages under Section IV because the acquisitions had not caused any "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent." *Id.* at 489 (emphasis in original). Respondents would have suffered

the same "loss" regardless of the identity of the concern acquiring the defaulting centers. *Id.* If a small concern as opposed to Brunswick had acquired the centers, respondents would have incurred the "loss" without a Section VII violation. The Court also noted that if the centers Brunswick acquired had been thriving businesses, the Section VII violation would have been at least as plain, yet respondents could not have identified any revenue they would have received but for the acquisitions. *Id.* at 487 n.12. In essence, respondents were seeking damages on the theory that they faced non-predatory competition from centers that otherwise would have closed, but the antitrust laws are meant to promote competition. It would contradict the purposes underlying antitrust law to award respondents profits they would have realized if fair competition had been reduced. *See generally* Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127 (1976).

On the first appeal in *Ohio I*, Sealy argued to this court that under *Brunswick* Ohio had suffered no damages compensable under Section IV. We dealt with Sealy's argument as follows:

> The thrust of Sealy's argument is that the competitive situation would have been the same regardless of whether the prior licensee, Ohio, or Sealy had primary responsibility for the territories in question. It insists that Ohio is merely a disappointed desirous purchaser of the licensees, and to award damages for the disappointment is a perversion of the antitrust laws. If Ohio had claimed damages here on the theory that, *e.g.*, Sealy's acquisitions in themselves violated Section VII of the Clayton Act, Sealy's argument might have some plausibility. Sealy ignores, however, the theory Ohio argued to the jury and on which the district court gave instructions, that Sealy's exercise of its right of first refusal was a part of a scheme of market allocation, done to keep Ohio from establishing new bases from which it

> might effectively compete with neighboring licensees.

Ohio-Sealy Mattress Manufacturing Co. v. *Sealy, Inc.*, 585 F.2d at 832.

Thus, the critical point we made in response to Sealy's argument was that acquisitions *could not be viewed in isolation* for purposes of determining the recoverability of damages under Section IV. This is entirely logical as a matter of first principles. Had Sealy not enforced the plant location clause and not collected passover and product service repair charges, Ohio could have located plants on the periphery of its Georgia territory and shipped bedding products into the Florida market unfettered by external constraints. The result would have been vigorous competition between Ohio and the Florida licensee for a share of the Florida market in Sealy products. The acquisition of the Florida licensee by Sealy was compensable in *Ohio I* only because Sealy employed *additional tactics* to maintain Florida as an enclave free of intrabrand competition. Had Sealy not used other tactics to erect barriers around the Florida territory, Sealy's acquisition of the Florida licensee would have been no more compensable under Section IV than was Brunswick's acquisition of defaulting bowling alleys. Under the same reasoning, Sealy's acquisition of the Pittsburgh and Philadelphia licensees became compensable under Section IV only because Sealy enforced the other contract provisions that prevented Ohio from competing in those territories from its bases in Ohio and Massachusetts. Finally, Sealy's denying a Toledo plant location was compensable because Sealy erected other barriers, such as the exclusive manufacturing territories provision, that kept elevated Ohio's cost of doing business beyond its territories.

At the time Ohio asked the jury to assess damages in *Ohio I*, Ohio was entitled to believe that Sealy would in the future obey the nation's antitrust laws. That is, Ohio could proceed under the assumption that, in the event of a verdict in Ohio's favor, Sealy would open its territories to reasonable

intrabrand competition from neighboring licensees. Judge Aspen was correct when he stated that at the time of trial Ohio could not have expected Sealy to hand the Philadelphia, Florida, and Pittsburgh licensees over to Ohio in the event the jury returned a verdict against Sealy. Judge Aspen, however, erred when he ignored all the other tricks, gambits, and ploys Sealy allegedly continued to use after April 1975 to seal off its territories from reasonable intrabrand competition. Ohio was perfectly correct to proceed under the assumption that Sealy would discontinue those tactics following an award in Ohio's favor that indicated the jury necessarily found a horizontal division of markets. It would have been absurd for Ohio to argue to the jury in 1975 that it would continue to feel antitrust injury from Sealy's acquisitions and denial of a Toledo plant location well into the future. That Sealy would not dismantle its barriers to reasonable intrabrand competition following a verdict for Ohio was highly speculative, and Ohio accordingly cannot be barred from bringing its current damages action.

This is an unusual case in that Sealy's liability in 1975 for its wrongful acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and denial of a new plant location in Toledo depended directly upon Sealy's enforcement of other contract provisions that effectively sealed off Philadelphia, Florida, Pittsburgh, and the out-of-APR territory around Toledo from intrabrand competition. The post-verdict damages that Ohio now seeks are thus not, as Sealy would have us believe, "continuing damages for *old* and *now insulated*, illegal conduct." *Exhibitor's Poster Exchange, Inc.* v. *National Screen Service Corp.*, 421 F.2d 1313, 1319 (5th Cir. 1970) (emphasis added). The post-verdict damages sought in *Ohio II* necessarily required for their accrual Sealy's alleged maintenance of the host of other devices that insured the APR's in question would remain enclaves untroubled by competition from Ohio. Ohio was not required to predict that these devices would remain in place following the 1975 verdict. A contrary conclusion on our part would in effect confer on defendants immunity from civil liability for their post-ver-

dict maintenance of barriers around Philadelphia, Florida, Pittsburgh, and the out-of-APR territories surrounding Toledo. *See Lawlor, supra,* at 329. We accordingly hold, with regard to the pre-verdict acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and pre-verdict denial of a Toledo plant, that Ohio may proceed with its legal claim in *Ohio II* to recover such post-verdict damages, if any, as it is able to prove for the period between April 1975 and April 1978 as a direct result of unlawful restraint, if any, continued by Sealy after April 1975 and to April 1978.

B. Judge Hart's June 16, 1983, Order

In its first appeal of *Ohio I* to this court, Ohio argued that Judge Parsons erred when he denied all equitable relief. We agreed with Ohio that Judge Parsons' denial was erroneous, and we remanded the cause to Judge Parsons with instructions to " take any additional evidence . . . [he] might find helpful in fashioning equitable relief." *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821, 845 (7th Cir. 1978). In 1979, when Judge Parsons convened the equitable relief hearing we had sanctioned, he advised the parties to submit to him additional evidence concerning post-verdict conduct:

> I have decided that I will need to hear additional evidence concerning three provisions of the license agreement which remained in dispute [the exclusive manufacturing territories provision, the right of first refusal clause, and the no-competitive interests provision]. Of concern with respect to all these provisions is the fact that the financial positions of the parties, their corporate structures and the economic conditions in the relevant market *may have today changed significantly over the course of this litigation.* The complaint in this case was filed eight years ago. The jury verdict was handed down over four years ago. I heard post-trial evidence on equitable relief almost three years ago. *Whatever changes*

have occurred during this time should bear substantially on plaintiffs' prayer for equitable relief.

(Emphasis added.) The relief proceeding focused largely on Ohio's challenge to the exclusive manufacturing territories provision and the issue of divestiture. Shortly before the conclusion of the hearing, Judge Parsons once again invited the parties to offer additional evidence. Finally, in a post-hearing order dated April 15, 1980, Judge Parsons advised the parties: "I should welcome any factual and explanatory assistance to me in fashioning an injunctive type order, even though it means considering transactions which post date the formal hearings [in August 1979] on equitable relief."

It is thus plain that Judge Parsons gave the parties ample opportunity to apprise the court of all post-verdict conduct that might have a bearing on Ohio's prayer for an injunction against enforcement of the exclusive manufacturing territories provision. Judge Parsons' practice of taking evidence on post-verdict conduct was clearly warranted by our 1978 instructions and as a matter of original principles. It would make little sense for a district judge to enjoin an evil no longer present or to ignore an evil that had turned acute since the time of the verdict. *Cf. Champion Sparkplug Co. v. Reich,* 121 F.2d 769, 772 (8th Cir. 1941), *cert. denied,* 314 U.S. 669; *Continental Securities Co.* v. *Interborough Rapid Transit Co.,* 207 F. 467, 471 (S.D.N.Y. 1913) ("[E]quity acts in the present tense . . . . [It] mold[s] the decree to actualities not history.").

Judge Parsons ultimately granted most of the equitable relief Ohio sought, but he concluded that an injunction against enforcement of the exclusive manufacturing territories provision was unnecessary to effect reasonable intrabrand competition. We affirmed Judge Parsons' decree in the second appeal of *Ohio I* to this court. *See Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.,* 669 F.2d 490, 496 (7th Cir. 1982). Ohio filed *Ohio II* in 1976 and requested, *inter alia,* an injunction against enforcement of the exclusive manufacturing territories provision. Judge Aspen thereafter lim-

ited the temporal scope of *Ohio II* to the period between April 1975 and April 1978. Judge Hart was thus correct when he held in his August 1, 1983 (sic: June 16, 1983), order that principles of res judicata barred Ohio from seeking an injunction in *Ohio II* against enforcement of the exclusive manufacturing territories provision. Every fact relevant to the injunction sought in *Ohio II* had occurred when, in March 1981, the district court entered the equitable decree in *Ohio I*. Ohio had a full and fair opportunity to present Judge Parsons with evidence of post-verdict occurrences that could militate in favor of enjoining exercise of the exclusive manufacturing territories provision. The fact that Ohio may not have availed itself of this opportunity is immaterial. Res judicata makes a final judgment conclusive as to the parties on all issues of fact and law that were litigated or could have been litigated. *See* J. Moore, J. Lucas and T. Currier, Moore's Federal Practice ¶ 0.405[1] (2d ed. 1983). Ohio now seeks a second chance in which to convince the district court that events occurring up to April 1978 require a result different from the one rendered by Judge Parsons in 1981 and perfected through appeal to this court in 1982. Res judicata is appropriately applied to prevent this needless relitigation of issues fairly and conclusively decided in prior proceedings.

Ohio raises two supplemental arguments in support of its position that it is entitled to litigate in *Ohio II* the issue of enjoining enforcement of the exclusive manufacturing territories provision. First, Ohio maintains that Judge Parsons expressly reserved Ohio's right to litigate in *Ohio II* the propriety of an injunction in light of post-verdict conditions. We reject this argument for three independent reasons. First and foremost, the passage of Judge Parsons' decree that Ohio quotes in support of its position plainly refers to independent matters, namely Sealy's acquisition of its Portland licensee and Sealy's threat to revoke Ohio's license. Judge Parsons reserved addressing these issues because they were the subject of *Ohio III*. The reservation when read in context, however, cannot be said to refer to the exclusive manufacturing territories provision. Second, it takes an irrational stretch of

the imagination to suppose that Judge Parsons would on three occasions invite the parties to submit evidence to him concerning post-verdict conditions and then base his decree solely upon conditions as they existed in 1975. Third, in his decree in *Ohio I*, Judge Parsons in fact referred to post-verdict conditions. For example, he expressly addressed himself to the "1975 Sealy Uniform License Contract," an agreement executed subsequent to the verdict in *Ohio I*. It is thus plain that Judge Parsons did not defer until *Ohio II* consideration of an injunction against enforcement of the exclusive manufacturing territories provision based upon post-verdict conditions. He expressly asked the parties to inform him about post-verdict conditions and formulated his decree in light of those conditions the parties chose to bring to his attention.

Ohio also argues that it is entitled to litigate the issue of enjoining the exclusive manufacturing territories provision because Judge Parsons' opinion is not "coherent." This make weight argument need not delay us long. Judge Parsons' opinion painstakingly analyzes the propriety of several equitable measures. On the issue of the exclusive manufacturing territories provision, Judge Parsons determined that permitting a licensee to manufacture anywhere in the nation would be tantamount to permitting a licensee to appropriate the licensor's property; no licensee would ever again seek multiple licenses, for his single license would enable him to manufacture wherever he desired. We approved of Judge Parsons' reasoning when we affirmed the decree of equitable relief in 1982. Ohio may have preferred a different outcome on this aspect of the *Ohio I* litigation, but it cannot now legitimately argue that its claim received less than a coherent disposition in prior proceedings.

For the sake of completeness, we raise one argument concerning res judicata that Ohio failed to make in its present appeal to this court. In *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500 (1959), the Supreme Court held that when legal and equitable claims are joined in one action, absent excep-

tional circumstances, a litigant has a right to have the issues common to the legal and equitable claims tried first to a jury. By virtue of our disposition of the first issue in this appeal, Ohio will now be entitled to proceed with its damages action. If we in addition hold that Judge Parsons' equitable relief proceeding in 1979 functioned as the equitable relief proceeding for *Ohio I* and *Ohio II*, it could be argued that Ohio is being forced in *Ohio II* to reverse the order of proceedings dictated by *Beacon Theaters*. Upon closer examination, however, this argument fails. *Beacon Theaters* requires a judge, absent exceptional circumstances, to hear equitable claims after legal claims have been tried to a jury because a reverse order might infringe upon a litigant's right to a jury trial. If the equitable proceeding were held first, principles of former adjudication would preclude the jury's consideration of issues necessarily and actually decided by the judge. In the instant case, the rationale articulated in *Beacon Theaters* behind having the legal proceeding come first, however, is inapplicable. The preclusive effects, if any, that follow from the proceeding before Judge Parsons will follow whether we label that proceeding "the equitable proceeding for *Ohio I*" or "the equitable proceeding for *Ohio I* and *Ohio II*." There accordingly would be nothing gained by postponing the equitable relief proceeding in *Ohio II* until after jury trial on the damages claim. The parties to the damages action in *Ohio II* will have no greater opportunity to try issues to the jury if we were to consider the equitable proceeding in *Ohio II* not to have yet taken place.

CONCLUSION

Having considered all the arguments urged by the parties to this appeal, we conclude that Ohio may proceed with its damages action against defendants to recover such post-verdict damages as it is able to prove for the period between April 1975 and April 1978 as a result of Sealy's pre-verdict acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and pre-verdict refusal of a Toledo plant location,

all as specified hereinbefore in this opinion. Ohio may not, however, proceed with its prayer for an injunction against enforcement of the exclusive manufacturing territories provision. The parties shall bear their own costs. The final judgment entered in the district court accordingly is AFFIRMED IN PART, REVERSED IN PART, and the cause is REMANDED to the district court for proceedings consistent with this opinion.

No. 76 C 810

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,
Plaintiffs,

v.

MORRIS A. KAPLAN, ET AL.,
Defendants.

AUGUST 1, 1980

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

This case comes before the Court for review of the Report and Recommendation issued by Magistrate Cooley on April 7, 1980, with respect to nine separate motions filed by the various parties.[1] Pursuant to 28 U.S.C. § 636(b)(1), the

1. Plaintiffs in this action, hereinafter referred to as "Ohio", are Ohio-Sealy Mattress Manufacturing Company and its wholly-owned subsidiaries: Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy Mattress Company of Fort Worth, Sealy of the Northeast, and Sealy Mattress Company of Georgia. There are two groups of defendants involved in these motions: Sealy, Inc. and its subsidiaries (Sealy Spring Corporation, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc.), hereinafter referred to as "Sealy"; and the former directors of Sealy and their respective licensees (Morris A. Kaplan, Sealy Mattress Company of Illinois, William H. Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Company, Morton H. Yulman, Sealy of Eastern New York, Inc., Sealy of Minnesota, Inc., Peter D.

(Continued on next page)

parties have filed comments on and objections to certain of the magistrate's findings and conclusions. Upon examination of the magistrate's recommendation and independent consideration of the arguments posed by the parties, the Court adopts Magistrate Cooley's recommended denial of (1) Ohio's motion for summary judgment based on collateral estoppel; and (2) Sealy's motion to strike the Clayton Act allegation contained in Count VI of the Amended Complaint.[2] For the reasons stated herein, however, the Court must reject the magistrate's recommendation (1) that defendants' motion for summary judgment as to post-verdict damages stemming from pre-verdict acts be denied; (2) that Ohio's motion to sever Count VI of the complaint be granted; (3) that Michigan-Sealy's motion to file a cross-claim against Sealy be granted; and (4) that Ohio's motion to consolidate the 1976 and 1979 cases be granted.[3]

(Continued from previous page)

Brown, Sealy Mattress Company of Michigan, Inc., T.C. Englehardt, Jr., Fred G. Hodges Bedding Company (a/k/a Sealy Mattress Company of Reading, Pa.), Sealy of Des Moines, Inc., Walter Hertz, Sealy Mattress Company of New Jersey, Inc., Joseph V. Moffitt, Sealy of the Carolinas, Peerless Mattress Company, Lloyd B. Rosenfeld, Sealy Mattress Company of Oregon, Joseph R. Rudick, Maryland Bedding Company, James E. Thompson), hereinafter referred to as "director-defendants".

2. Defendants' motion to stay the proceedings in *Ohio-Sealy Mattress Manufacturing Co.* v. *Duncan*, 79 C 2741 (N.D.Ill.), pending the conclusion of this action and of proceedings in *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 71 C 1243 (N.D.Ill.), has been withdrawn, and thus need not be addressed further by this Court. And, since the parties have not objected to the Magistrate's recommendation that Ohio's motion to strike the defendants' summary judgment motion be denied, this Court will adopt that recommendation without comment. *See Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

3. The magistrate also recommended that Ohio's motion to sever Count V of the complaint be granted. The Court, however, will defer consideration of that recommendation until the parties have responded fully to the Magistrate's Report and Recommendation of June 9, 1980, which contains a recommendation on defendants' motion for summary judgment as to Count V.

I. Ohio's Motion For Summary Judgment Based On Collateral Estoppel

Although the Court is in agreement with the magistrate's recommendation that this motion be denied, the Court nonetheless deems it appropriate to clarify its view on this matter and to address certain precedent not discussed by the magistrate. Contrary to the view expressed by the magistrate, the Court does not believe that *White* v. *Finkbeiner*, 570 F.2d 194, 201 (7th Cir. 1978), forecloses the possibility that an appellate court decision, by extrapolating from the trial court record, may provide the factual predicate necessary to accord a general jury verdict collateral estoppel effect. Rather, as the magistrate also concluded, the Court finds that the Seventh Circuit opinion in *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979) ("*Ohio-Sealy*"), simply did not provide such a predicate. With the exception of the findings that the jury "necessarily found that Sealy had allocated markets," *id.* at 827; and that "at least one of Sealy's first-refusal acquisitions . . . violated the antitrust laws," *id.* at 844, the court declined to hold that any particular practice attacked by Ohio was found by the jury to violate the antitrust laws. *Id.* at 844. Thus, beyond the holding that the jury found the existence of an illegal market allocation scheme, the Seventh Circuit opinion cannot collaterally estop defendants from litigating the legality of the practices attacked in this action.

Nor can the jury foreman's notes and affidavit be used to embellish the general jury verdict. The Court agrees that to allow such inquiry into the deliberative process would be contrary to the policy considerations underlying Fed.R.Evid. 606(b).[4] The decision in *Katz* v. *Eli Lilly & Co.*, 84 F.R.D. 378,

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4. This is particularly so in light of Ohio's failure to seek one of the more specific types of verdicts permitted by Fed.R.Civ.P. 49. Although such verdict forms are available not by right of the parties but rather at the discretion of the trial judge, *Sadowski* v. *Bombardier Ltd.*, 539 F.2d 615,

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380-382 (E.D.N.Y.1979), which permitted defendants to depose jury members for the purposes of determining the collateral estoppel effect to be accorded to a prior jury verdict, is factually distinguishable from this case in several important respects. First, the prior jury verdict in that case was rendered in New York state court, under whose law such examination of jurors apparently was permissible. 84 F.R.D. at 381 n.5. Second, the court found it appropriate to permit the defendants to inquire into the jury verdict in order to afford them an opportunity to meet the plaintiffs' attempt to use the jury verdict in an offensive application of collateral estoppel. *Id.* at 382. Here, on the other hand, it is the parties seeking to inquire into the jury's deliberations who are attempting to apply the collateral estoppel doctrine. Thus, on the facts, the Court does not believe that *Katz* provides compelling authority for Ohio's position. Moreover, to the extent that *Katz* might be considered applicable to this situation, the Court declines to follow that precedent. Thus, Ohio's

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622 (7th Cir. 1976), a number of courts have recognized the desirability of using special verdict forms in complex litigation. *See, e.g., Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979); *Jamison Co., Inc.* v. *Westvaco Corp.*, 526 F.2d 922, 935-936 (5th Cir. 1976); *Envirex, Inc.* v. *Ecological Recovery Associates, Inc.*, 454 F.Supp. 1329, 1339-1340 (M.D.Pa.1978), *aff'd*, 601 F.2d 574 (3d Cir. 1979). Indeed, as Judge Parsons himself has observed, his task in the equitable proceedings in the 1971 action would have been facilitated had there been explicit findings of fact made by the jury. *See* Transcript in Civil Action No. 71 C 1243 at 55 (November 5, 1979). In any event, because Ohio failed to request such a verdict form, the Court cannot say whether Judge Parsons would have granted the request.

The Court emphasizes that the foregoing is not intended to suggest that Ohio is being "punished" for its failure to seek one of the alternative verdict forms permitted under Rule 49. Rather, the Court's discussion of Rule 49 only serves to underscore Ohio's failure to seek specific findings of fact by available means which do not conflict with the policies underlying Rule 606(b).

motion for summary judgment based on collateral estoppel is denied.[5]

II. Defendants' Motion To Strike The Clayton Act Allegation Of Count VI

The Court agrees with the magistrate's conclusion that the defendants have not shown they will be prejudiced unduly by permitting Ohio to pursue its Clayton Act claim. There is no question but that Ohio should have made this allegation part of the pleadings at an earlier date. However, defendants do not contend that they did not know of Ohio's intention to pursue this theory of liability in the instant action. *See Middle Atlantic Utilities Co.* v. *S.M.W. Development Corp.*, 392 F.2d 380, 386 (2d Cir. 1968). Moreover, in light of the Court's ruling disposing of much of the amended complaint on the basis of res judicata and satisfaction of judgment, defendants' argument that the addition of the Clayton Act claim would further complicate an already unwieldy case carries little weight. Inasmuch as defendants have offered no other evidence of prejudice resulting from the addition of the Clayton Act claim, their motion to strike must be denied. *Seifert* v. *Solem*, 387 F.2d 925, 929 (7th Cir. 1967).

III. Defendants' Motion For Summary Judgment

In this motion — the most significant of those addressed by the magistrate in his report and recommendation — the defendants seek to preclude Ohio from recovering post-verdict damages resulting from pre-verdict acts alleged in

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5. Ohio has requested that this Court certify for immediate appeal under 28 U.S.C. § 1292(b) the question of whether a juror's notes may be used to determine the collateral estoppel effect to be accorded a general jury verdict. First, the Court does not believe that there is "substantial ground for difference of opinion" on this issue, since *Katz* is distinguishable on its facts. Moreover, given the Court's decision to grant defendants' motion for partial summary judgment, explained *infra*, it is unlikely that the factual matters Ohio seeks to estop relitigation of will have significant bearing in this case. Thus, it is unlikely that immediate appeal would "materially advance the ultimate termination of the litigation."

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Counts I-IV and VI of the Amended Complaint.[6] Sealy argues that Ohio could have sought all past and future damages arising from defendants' pre-verdict conduct in the trial of the 1971 case. Thus, Sealy contends that because there was a final judgment as to Ohio's damages from those acts, Ohio is barred by res judicata from now recovering any damages it failed to seek in the 1971 action.[7] The director-defendants seek summary judgment on the same ground, conceding for the purpose of the summary judgment motion the existence of privity with Sealy.[8] In addition, the director-defendants contend that Ohio is barred by the doctrine of satisfaction of judgment from seeking recovery.

The magistrate recommended that the defendants' motion be denied. In reaching this conclusion, the magistrate

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6. Ohio agrees that it is foreclosed by the judgment in the 1971 case from seeking any further pre-verdict damages that might have stemmed from pre-verdict conduct. Defendants, for their part, do not dispute Ohio's right to seek post-verdict damages stemming from any acts committed subsequent to the verdict in the 1971 case. Thus, the Court's references to "future" or "post-verdict" damages will include only those post-verdict damages that allegedly are the result of pre-verdict acts.

7. The principles, as well as the underlying policies, of res judicata are well-established. In order to protect litigants from the time and expense of multiple lawsuits, to conserve judicial resources, and to minimize the possibility of inconsistent opinions, the courts have applied res judicata to bar further claims by parties or their privies based on a cause of action that has been terminated by a final judgment on the merits. *Montana* v.*United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973, 59 L.Ed.2d 210; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877). Thus, the question presented by the res judicata motion — and indirectly by the satisfaction of judgment motion — is whether the future damages sought herein by Ohio are part of the same cause of action terminated by the final judgment in the 1971 case.

8. The director-defendants, unlike Sealy, do not admit that Ohio did not seek future damages in the trial of the 1971 action. In light of the Court's disposition of their motion, however, it is unnecessary at this time to determine if in fact the jury award did include the future damages sought by Ohio in this action. *See Cromwell*, 4 Otto at 352, 94 U.S. at 352, 24 L.Ed. 195 (res judicata bars litigation of all claims that could have been raised, as well as those that were raised, in a prior proceeding on the same cause of action).

determined that res judicata—as well as satisfaction of judgment—would not be applicable to post-verdict damages for the reason that such damages are equitable in nature, and that there has been no final judgment in the 1971 case on the equitable relief sought by Ohio. Neither Ohio nor the defendants, however, agree with this characterization of Ohio's request for post-verdict damages. Nor does this Court. It is clear that the future damages sought by Ohio in this action represent legal relief in the same sense as those damages which Ohio sought at the trial of the 1971 case. The legal nature of the future damage relief is further highlighted by Ohio's request for treble damages, which is unavailable under the equitable provisions of 15 U.S.C. § 26. This legal relief is separate and distinct from any incidental damages that Ohio might seek in an equitable proceeding, as is evident from the fact that Ohio presently is seeking monetary relief as an incident of the equitable relief it hopes to receive in the proceeding under advisement before Judge Parsons. The Court, therefore, considers the post-verdict damages that Ohio is seeking herein to be legal relief for alleged harm from acts which were litigated and finally decided in the 1971 action.[9]

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9. Even were this Court in agreement with the magistrate's characterization of future damages as equitable, it nonetheless would dismiss Ohio's claim for these damages as a result of the equitable proceeding pending before Judge Parsons. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976); *United Steelworkers* v. *Hamilton Steel Products, Inc.*, 404 F.2d 878, 879 (7th Cir. 1968), *cert. denied*, 394 U.S. 1000, 89 S.Ct. 1595, 22 L.Ed.2d 778 (1969) ("We think it was within the discretion of the district court to refuse to entertain the Union's Section 301 suit at this late date, for the issues can be properly disposed of in the interpleader and bankruptcy proceedings"); *United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 203-204 (3d Cir. 1967), *cert. denied*, 390 U.S. 922, 88 S.Ct. 857, 19 L.Ed.2d 983 (1968) ("[C]ertainly, if the . . . relief sought in the sister court has been requested by the aggrieved parties . . . the sister court should hold its hand."). *See also* 1B Moore's Federal Practice ¶ 0.410[2] at 1164-1165 ("[I]f separate suits are instituted and pending for various parts of a single cause of action, the pendency of the first may be pleaded in abatement of the others.").

Viewed thusly, Ohio's claim for post-verdict damages against Sealy would appear to be foreclosed by res judicata, since the right to future relief generally merges with the past damage relief obtained in the judgment. Ohio, however, posits three arguments in an attempt to avoid this result. For the reasons that follow, this Court finds each equally unpersuasive.

Initially, Ohio asserts that because it had the "election" of pursuing future equitable relief or future legal relief in the 1971 action, it necessarily had the "election" to seek future equitable relief in that action and reserve the right to pursue future legal relief in a separate proceeding. Ohio's argument, however, fails to explain why its "election" should supersede the principles of res judicata that normally are applicable in situations such as this. Broadly speaking, a party always has the option—or election—of raising fewer than all the potential theories of relief that might be available. However, it is the rule that when a party can present all grounds in support of his cause of action, he must do so, if at all, in the proceeding on that cause of action. *Lambert* v. *Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976). Once a final judgment is entered on that cause of action, res judicata prohibits relitigation of all issues raised therein as well as "all relevant issues which could have been but were not raised and litigated in the suit." *In re Interstate Stores, Inc.*, 558 F.2d 1046, 1047 (2d Cir. 1977); *see also Cromwell*, 94 U.S. at 352; *F. L. Mendez & Co.* v. *General Motors Corporation*, 161 F.2d 695, 699 (7th Cir. 1947). Thus, Ohio's talismanic invocation of the word "election" does not answer the question of whether its failure to seek future damages in the trial of the 1971 action precludes it from pursuing those damages in this action. Rather, the answer to that question turns upon whether the post-verdict damages Ohio now seeks were a part of the cause of action terminated by a final judgment in the 1971 action.[10]

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10. Ohio's "election" theory is not salvaged by citation to *Roberts* v. *Sears, Roebuck and Company*, 617 F.2d 460 (7th Cir. 1980). In that case,

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Ohio argues that since post-verdict damages were speculative at the time of trial in 1971 action, those damages constitute a separate cause of action under the reasoning in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971). In that case, which involved a question concerning the four-year statute of limitations applicable to antitrust actions, the Supreme Court observed that a cause of action accrues "when a defendant commits an act that injures a plaintiff's business," and that each cause of action that accrues entitles a plaintiff to recover past as well as future damages he predictably will

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plaintiff had filed suit seeking restitution or damages for defendant's fraudulent conduct in obtaining assignment of a valuable patent. Subsequent to a jury award of $1 million, the trial judge denied plaintiff the remedy of restitution on the ground that the jury verdict constituted an election of remedies. Plaintiff appealed this ruling, and defendant cross-appealed on the ground that it had been denied the opportunity to challenge the validity of the underlying patent. In *Roberts* v. *Sears, Roebuck & Co.* 573 F.2d 976, 980-982 (7th Cir. 1978), *cert. denied*, 439 U.S. 860 (1978), the Seventh Circuit found that Sears was not entitled to raise patent defenses to plaintiff's fraud action. The court also found that while traditional election of remedies doctrine might preclude the desired equitable relief, it would not be a bar to return of the patent based on rescission. On remand, however, the trial judge not only granted return of the patent, but also ordered an accounting of defendant's profits reaching back to the date of assignment. In the second appeal, the Seventh Circuit found that the only further remedy plaintiff could receive in the fraud action was restoration of the patent as of January 20, 1977, the date of final judgment on the jury verdict. The court emphasized, however, that plaintiff could sue for any alleged patent infringement occurring after that date, and that defendant could defend in such an action on the basis of patent invalidity. 617 F.2d at 465.

Ohio suggests that *Roberts* sanctions the procedure it has adopted, whereby it sought past damages up to the point of trial in the 1971 action and now seeks post-verdict damages in a separate proceeding. As is evident from the foregoing, however, any future damages the plaintiff in *Roberts* might seek stem not from the fraud cause of action that terminated in the final judgment of January 20, 1977, but rather from a distinct cause of action arising from patent infringement subsequent to that date. Thus, since Ohio has not persuaded the Court that the future damages sought herein constitute a separate cause of action from the 1971 case, *Roberts* provides no authority for its position.

suffer. In order to recover such damages, however, the Supreme Court held that suit must be filed within four years of the complained of acts unless "the fact of their accrual is speculative or their amount and nature unprovable," for the reason that the speculative nature of the damages makes it impossible to say that a cause of action has accrued.

Ohio seeks to apply this reasoning to the instant case. Ohio alleges that it could not have known that it would suffer post-verdict damages from the acquisitions, since it had no way of knowing whether the defendants would retain possession of the acquired corporations after the jury verdict. In addition, Ohio argues that the amount of future damages it would suffer in the event of defendants' continued retention of the acquired corporations was unprovable.

Assuming the applicability of the *Zenith* doctrine to issues of res judicata,[11] the Court is unpersuaded that Ohio's damages were speculative in either of the senses contemplated by *Zenith*. Ohio's position as to the fact of post-verdict damage is simply specious. Distilled to its essence, Ohio's position is that because there has been a delay in the equitable relief sought — which relief conceivably might include divestiture of the disputed acquisitions and their resale to Ohio — and because the defendants voluntarily could have given or sold the acquisitions to Ohio, the possibility of future damages was so speculative as to preclude presentation to the jury. The latter argument flies in the face of reason, as it

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11. What little authority there is on this question is split. Compare *Neeld* v. *National Hockey League*, 439 F.Supp. 446, 452 (W.D.N.Y. 1977) with *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 456 F.2d 662, 667 (5th Cir. 1972); *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 369 F.Supp. 316, 326 (M.D.N.C. 1973), rev'd on other grounds, 527 F.2d 1162 (4th Cir. 1975). The Court believes that the policies underlying the *Zenith* speculativeness exception to accrual of causes of action in statute of limitations cases applies equally to issues of res judicata. However, in light of the Court's conclusion that Ohio's damages were not speculative at the time of trial in the 1971 case, it need not decide this issue, but rather may assume the applicability of this doctrine to the instant case.

assumes that a party which has litigated to keep certain acquisitions suddenly would do an about-face and "give up" those same acquisitions. Moreover, to the extent that the prospect of the equitable hearing created some uncertainty as to the existence of future damages, that uncertainty was the result of Ohio's initial election to seek post-verdict equitable rather than legal relief. Certainly the Supreme Court in *Zenith* did not contemplate that a plaintiff by its own actions could create speculativeness, and then use that uncertainty as to future damages to avoid the policies underlying res judicata.

Ohio fares no better in its argument as to the unprovable nature of the post-verdict damages. As this Court has observed,

> . . . there is broad latitude in establishing damages in private antitrust actions . . . . While the amount of damages may not be calculated solely on the basis of mere speculation or guesswork, neither is it required that the damages be based on mathematical certainties. Rather, the finder of fact 'may make a just and reasonable estimate of the damage based on the relevant data presented at trial and render its decision accordingly.' *Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976).

Ohio-Sealy Mattress Manufacturing Co. v. *Duncan*, 486 F.Supp. 1047, 1053 (N.D.Ill. 1980) ("Duncan"). Defendants have suggested two methods for calculating loss of future profits, both of which have been approved by various courts: projecting future profits on the basis of past profit performance, and discounting that figure to present value, *Shor-Line Rambler, Inc.* v. *American Motor Sales*, 543 F.2d 601, 605 (7th Cir. 1976), *Greene* v. *General Foods Corp.*, 517 F.2d 635, 663-666 (5th Cir.), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976); and determining the fair market value of

a business. *See e.g. Landon* v. *Twentieth Century-Fox Film Corp.*, 384 F.Supp. 450, 458 (S.D.N.Y.1974). Although Ohio has argued that the fair market value approach is inaccurate in that it would fail to give it the benefit of its bargain, it has been silent as to the alternative approach suggested by defendants. And, indeed, the Court believes that the technique of projecting lost future profits could have been used by Ohio in the trial of the 1971 action. In a similar situation, the court in *Greene* approved the use of expert testimony which calculated future profits on the basis of "trends established in the years preceding the termination, giving more emphasis . . . to the more recent years." 517 F.2d at 664. The court explained that such an estimate was likely to be fairly accurate since the plaintiff had been in business for 19 years and thus had an ample data base from which to work. *Id.* As this Court has observed, Ohio in the first trial adduced considerable evidence as to its lost past profits, using the technique of applying "a representative Ohio plant profit margin to the sales actually made by Sealy after acquisition." *Duncan*, 486 F.Supp. at 1053. Moreover, as in *Greene*, there was a wealth of comparative information from which Ohio could have drawn projections of future profits. Thus, the Court finds that this past profit data could have been used by Ohio in the 1971 case to make a reasonable estimate of future damages.

Ohio misconceives the meaning of *Zenith* when it asserts that the decision held this method of calculating future damages to be impermissible. *Zenith* did not alter the well-established body of law governing the question of speculativeness. Rather, it simply applied that body of law to statute of limitations questions. Indeed, this is borne out by the use of this method of calculation in *Shor-Line Rambler* and *Greene*, both decided after *Zenith*. Thus, the *Zenith* Court's rejection of the proposed method of calculating future profits therein turned upon the facts of that case. For that reason, *Zenith* is of aid to Ohio's position only if the facts of the 1971 action are sufficiently similar to those presented in *Zenith*. In *Zenith*, however, the plaintiff was seeking damages for its exclusion from entry into a particular market. To prove future dam-

ages, plaintiff not only would have had to show what its ultimate market share would have been, but also how long it would have taken it to achieve that market share and the lingering effects it would have suffered. In the 1971 case, however, Ohio had sought to enter a market by purchasing going concerns rather than by starting new enterprises. For this reason, the ultimate market share that Ohio would have had was known, as was the time it would have obtained that share absent the allegedly illegal acquisitions. Unlike *Zenith*, the Court does not believe that Ohio's future damage claims would have gotten "short shrift" had they been pursued in the 1971 case. *See Zenith*, 401 U.S. at 342, 91 S.Ct. at 808. Thus, the Court concludes that Ohio's post-verdict damages at the time of trial in the 1971 case were not speculative within the meaning of *Zenith*.[12]

Finally, Ohio claims that the post-verdict damages sought herein were not part of the 1971 cause of action because they resulted from post-verdict "nonactions" by

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12. The Court observes that the magistrate reached the same conclusion. He found, however, that future damages were speculative in the sense that Ohio's future damages were infinite in amount, whereas the defendants' capacity to respond in damages was finite. To the extent this kind of "speculativeness" ever may be said to exist, it is not of the type contemplated by *Zenith*. Nor can the rules of res judicata be relaxed, as the magistrate implicitly suggested, because Ohio might have feared that the jury simply would not return a damage award of the magnitude that would have resulted from the inclusion of future damages. Indeed, even as a factual matter, this view of the jury process is of questionable validity, particularly in light of the recent damage award returned by the jury in *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 74 C 0633 (N.D.Ill).

The Court also rejects Ohio's argument that summary judgment is precluded on this issue by virtue of the existence of disputed facts as to the speculativeness of future damages at the time of trial in the 1971 case. Inasmuch as the Court has the benefit of the record and theories in that action, an evidentiary hearing would not be of further assistance to the Court in deciding whether future damages were speculative. Indeed, in an analogous situation, the Supreme Court in *Zenith* decided the speculativeness issue itself rather than remand the case for a hearing and determination by the trial judge. 401 U.S. at 340, 91 S.Ct. at 807.

defendants. In *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), the Supreme Court recognized that a prior judgment did not bar a subsequent action involving essentially the same course of conduct, since "[s]uch a course of conduct — for example, an abatable nuisance — may frequently give rise to more than a single cause of action." *Id.* at 327-328, 75 S.Ct. at 868. In *Lawlor*, however, the subsequent action did not arise merely out of defendant's failure to abate an abatable nuisance, but rather from overt acts occurring subsequent to the prior judgment. *Id.* at 328, 75 S.Ct. at 868. That subsequent causes of action may arise only from acts, rather than the continued consequences of adjudicated past behavior, also is implicit in *Zenith*, which observed that antitrust causes of action accrue each time "a defendant *commits an act that injures* a plaintiff's business." 401 U.S. at 338, 91 S.Ct. at 806 (emphasis supplied).

And indeed, the weight of the authority requires post-verdict actions by a defendant, rather than adverse consequences stemming from inaction, in order to establish a cause of action. For example, in *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), the court distinguished between continuing conduct by a defendant that caused damage and the "continuing damages it [plaintiff] feels from a single day's monopoly and refusal to deal . . . " *Id.* at 125. In the latter instance, the "actionable wrong is by its nature permanent at initiation without further acts." *Id.* at 126. Thus, once that wrong is litigated, a plaintiff is not entitled to maintain a subsequent action to remedy the "abatable but unabated inertial consequences" of that actionable wrong. *Id.* at 128. In the former situation, however, a subsequent action may be maintained, since the post-verdict action and damage give rise to a cause of action distinct from the one litigated earlier. *See also In re Multi-district Vehicle Air Pollution*, 591 F.2d 68, 71-72 (9th Cir. 1979); *Imperial Point Colonnades Condominium* v. *Mangurian*, 549

F.2d 1029, 1035 (5th Cir. 1977).[13] The Court considers defendants' acquisitions of the businesses in question, to the extent they were illegal, to be of the type of acts that are by their "nature permanent at initiation." Any damage suffered by Ohio was complete at the time of acquisition and, as the Court has held, capable of proof. Unlike the situation where there are continued refusals to deal, the acts causing the damage — the acquisitions — have not been repeated.[14] Thus, the Court must reject Ohio's argument that defendants' refusal to divest themselves of the acquired businesses and thereby abate the "inertial consequences" of those acquisitions constitutes a new cause of action.[15]

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13. Although these cases deal with statute of limitations issues, the Court believes the principles enunciated therein are applicable in this context as well. Ohio argues that *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 421 F.2d 1313, 1318 (5th Cir. 1970), a case involving res judicata, applies a more lenient rule in determining new causes of action. Therein, the court held that significant actions or *nonactions* occurring subsequent to the filing of a related lawsuit may give rise to new causes of action for damages. However, in a subsequent appeal in that action, the court clarified its earlier opinion by stating that "we concluded that they [the pleadings] could be read to allege new claims based on *significant post-1961 actions . . .* " *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 110, 113 (5th Cir. 1975) (emphasis supplied).

14. For this reason, the recent decision in *Borger* v. *Yamaha International Corp.*, 625 F.2d 390, 398 (2d Cir. 1980), is inapposite. There, the court found that future profits were too speculative to be considered by a jury in a refusal to deal case, since "it would be pure speculation for the jury to determine that Yamaha's refusal to grant Borger's a franchise was forever irrevocable . . . ." *Id.* at 398.

15. Nor is there merit in Ohio's contention that defendants' alleged post-verdict conduct — such as requiring passover and warranty payments — permit it to seek future damages stemming from the pre-act acquisitions. It is clear that Ohio may sue only for those damages which occur as a result of some post-verdict act. The mere allegation that the post-verdict acts were but a continuation of the pre-verdict conspiracy is insufficient to entitle Ohio to damages in addition to those which it has received to remedy defendants' pre-verdict conduct. *Baker* v. *F & F Investment*, 420 F.2d 1191, 1200 (7th Cir.), *cert. denied, Universal Builder's, Inc.* v. *Clark*, 400 U.S. 821, 91 S.Ct. 40, 27 L.Ed.2d 29 (1970).

Thus, for the foregoing reasons, it is clear that Ohio's effort to seek post-verdict damages from Sealy is barred by res judicata. Whether the same doctrine bars Ohio from seeking those damages from the director-defendants is more problemmatic. The director-defendants were not parties to the 1971 action; and, in their answer to the complaint, they deny the existence of privity with Sealy. Without privity, of course, the director-defendants cannot invoke the doctrine of res judicata.

This point need not detain the Court, however, inasmuch as the principle of satisfaction of judgment provides an independent basis for the director-defendants' motion.[16] Irrespective of privity, that doctrine provides that "where a plaintiff has obtained a judgment against one tortfeasor and that judgment has been satisfied, the plaintiff is barred from seeking recovery from another joint tortfeasor." *Hartsfield* v. *Seafarers International Union*, 427 F.Supp. 264, 267 (S.D.Ala. 1977); *see also Sessions* v. *Johnson*, 5 Otto 347, 95 U.S. 347, 24 L.Ed. 596 (1877). Moreover, this rule obtains, regardless of whether plaintiff sought or received all damages that allegedly resulted from the wrong litigated in the earlier proceeding. *Hartsfield*, 427 F.Supp. at 268. As the court in *Hartsfield* observed, the underlying rationale of satisfaction of judgment is twofold. First, it seeks to prevent plaintiffs from receiving unjust enrichment by filing seriatim actions against individual tortfeasors and obtaining windfall recovery. Second, the

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16. The director-defendants have argued that they may admit privity only for the purposes of this motion, while reserving the question as to the other aspects of the case. It is true that if these defendants would fail in their motion, any admissions made for the purposes of the motion would not be binding. Conversely, if defendants prevail on a motion based in part on an admission made therein, that admission is binding on them for the other issues in the case. *Stahly, Inc.* v. *M. H. Jacobs*, 183 F.2d 914, 919 (7th Cir.), *cert. denied*, 340 U.S. 896, 71 S.Ct. 239, 95 L.Ed. 650 (1950). At any rate, the director-defendants stated that they would concede the privity issue if the Court ruled against them on the satisfaction of judgment motion, and held that they would not admit privity solely for the purpose of the motion. Thus, res judicata provides an alternate basis for granting director-defendants' motion for partial summary judgment.

doctrine is court-protective in that it prevents the drain on judicial time and resources that otherwise would result from such repeated litigation. *Id.* at 267.

There is no question but that Ohio has received full payment of the $10.2 million judgment it obtained in the 1971 action, as well as an additional $2.8 million in interest. The fact that there has not as yet been an attorneys' fee award made does not render the judgment unsatisfied. *See* Rule 32(b), General Rules for the Northern District of Illinois ("The clerk shall enter the satisfaction of a judgment upon payment to the court of the amount of the judgment plus interest and costs"); *cf. Swanson* v. *American Consumer Industries, Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (attorneys' fee awards held to be incidental to the main litigation.)[17] Nor does the fact that Ohio accepted a remittitur, thereby halving its recovery, obviate the satisfaction of judgment. Whether or not the trial judge in the 1971 action erred in ordering a remittitur is irrelevant. As the Seventh Circuit recognized, Ohio, by accepting the remittitur rather than opting for a new trial and the opportunity to appeal therefrom, waived the right to challenge the adequacy of the remitted judgment. *Ohio-Sealy*, 585 F.2d at 840. By seeking additional recovery from the director-defendants, Ohio is attempting to attack indirectly that which it has waived the right to attack directly. This the Court will not permit Ohio to do.

Accordingly, the Court grants Sealy's motion for partial summary judgment on Counts I-IV and VI of the amended complaint, and the director-defendants' motion for partial summary judgment as to Counts I-IV. The effect of this ruling is that Ohio may not seek post-verdict damages for any acts that occurred prior to the verdict in the 1971 action.

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17. This is not to suggest — nor do the director-defendants so argue — that satisfaction of judgment bars Ohio from seeking an attorneys' fee award at the close of the equitable proceeding in the 1971 case. Rather, the Court merely finds that the absence of an attorneys' fee award to date does not bar application of the satisfaction of judgment doctrine to prohibit Ohio from seeking additional damages for pre-verdict conduct.

IV. Ohio's Motion to Sever Count VI

The magistrate recommended that this motion be granted, largely for the reason that the allegations and theories contained in Count VI were considerably different from those contained in the remainder of the complaint, and that severance would make for an easier and less confusing trial. Sealy did not oppose this motion, either in the proceedings before the magistrate or in the briefs filed with this Court. However, the Court observes that the need for severance is greatly diminished in light of the ruling today disposing of many of the allegations in Counts I and VI, as well as Counts II-IV in their entirety. Thus, severance of Count VI would appear to be unnecessary in view of the present posture of the case. Accordingly, the motion to sever Count VI will be denied without prejudice to a future motion by Sealy or Ohio should severance become appropriate.

V. Michigan-Sealy's Motion To File A Cross-Claim Against Sealy, Inc.

The magistrate recommended that this motion be granted, inasmuch as there would be no prejudice to defendants and it would be in the interest of judicial economy to have the cross-claim tried in the same case with Counts I and III of the Amended Complaint, whose theories it closely tracks. Once again, however, this conclusion must be reassessed in light of the Court's decision granting defendants' summary judgment on the acquisition claims set forth in these counts. In the present posture of the case, the cross-claim that Michigan-Sealy seeks to file would not promote judicial economy, but rather would complicate the trial of the 1976 case. Moreover, denial of Michigan-Sealy's motion to file a cross-claim would not prejudice that party's right to proceed in a separate action on the theories contained therein. Accordingly, Michigan-Sealy's motion to file a cross-claim is denied.

VI. Ohio's Motion To Consolidate The 1976 And 1979 Cases

By this motion, Ohio seeks to consolidate Counts I-IV of the 1976 case with certain elements of the 1979 case. The magistrate recommended that this motion be granted, with the qualification that the cases should be severed if the 1976 case would be ready for trial before the 1979 case. However, inasmuch as Counts I-IV of the Amended Complaint substantially have been disposed of by today's opinion, consolidation now would be inappropriate.[18] Accordingly, the motion to consolidate is denied.[19] It is so ordered.

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18. In light of this decision, the Court also will deny Ohio's motion under Fed.R.Civ.P. 15 to amend the pleadings in the 1976 and 1979 actions by filing one consolidated complaint.

19. In denying this motion, the Court nonetheless expects counsel in the 1976 and 1979 actions to follow through on their stated intention to cooperate on the discovery in the two actions, in order to satisfy the previously stated desire of all parties that both cases be brought to trial as expeditiously as possible.

No. 76 C 810

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OHIO-SEALY MATTRESS MANUFACTURING CO., ET AL.,
Plaintiffs,

v.

MORRIS A. KAPLAN, ET AL.,
Defendants.

JUNE 16, 1983

MEMORANDUM OPINION AND JUDGMENT ORDER

HART, District Judge:

This matter is before the Court on defendants' motions for summary judgment on § II.D(a) of the Schedule of Issues (exclusive manufacturing territories clause); § II (B) 4 (pass-over payment and warranty repair charges); and § III (interlocking directorates claim). All other matters in dispute have been resolved by rulings or settlement.

I. The Exclusive Manufacturing Clause

Section II.D(a) of the Schedule of Issues states:

> Plaintiff also contends that equitable relief must include at the very minimum:
>
> (a) elimination of the exclusive manufacturing territories and related provisions adopted immediately after the April, 1975 jury verdict.

Defendants urge that the doctrine of *res judicata* bars the Court's reconsideration of this issue in this case.

The resolution of this issue depends in part on the fact that Judge Aspen has previously limited the time period of this case to conduct occurring between April 3, 1975 and April 24, 1978. Conduct alleged to have occurred after April 24, 1978 is the subject of other actions pending before this Court. 90 F.R.D. 40, 43 (N.D. Ill. 1981).

In *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, No. 71 C 1243, the plaintiffs in this action, Ohio-Sealy Mattress Manufacturing Co., et al. ("Ohio"), obtained a money judgment against some of the same defendants here for illegal tying and price-fixing arrangements regarding mattress components. A money judgment was entered for Ohio, but after holding a hearing Judge Parsons declined to grant any equitable relief. On appeal and cross-appeals to the United States Court of Appeals for the Seventh Circuit, that court on October 12, 1978, affirmed the money judgment and remanded the case for consideration of Ohio's claims for equitable relief. *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) ("Ohio I").

It is clear from the Court of Appeals' opinion in Ohio I that Ohio urged that the district court erred in refusing to invalidate the exclusive manufacturing territories clause set forth in the license agreement adopted by Sealy, Inc. ("Sealy") in April of 1975. At page 828 of the opinion in Ohio I, specific reference is made to this clause in the license agreement. At pages 844-45 of the opinion, the Court of Appeals stated:

> We think the Court should have another opportunity to consider equitable relief on market allocation in this light, and with the benefit of the law applicable to this case as we have discussed it in part I of this opinion. We do not mean to say by any means that the court must find any particular practice

> attacked by Ohio to violate the antitrust laws. It should consider the evidence adduced both at the jury trial and at the equitable relief hearing.

On August 24, 1979, after the case was remanded to this Court, Judge Parsons advised the parties as follows:

> I have decided that I will need to hear additional evidence concerning the three provisions of the license agreement which remain in dispute. Of concern with respect to all of these provisions is the fact that the financial positions of the parties, their corporate structures and the economic conditions in the relevant market may have today changed significantly over the course of this litigation. The Complaint in this case was filed eight years ago. The jury verdict was handed down over four years ago. I heard post-trial evidence on the equitable relief almost three years ago. Whatever changes have occurred during this time should bear substantially on plaintiffs' prayer for equitable relief. (Tr. p.7).

Thereafter, the proceedings before Judge Parsons included a consideration of the license provisions contained in the 1975 version of the license contract which was adopted by the shareholders and by the licensees of Sealy on April 4, 1975 as amendment No. 6 to the license contract. It further appears that Ohio was given the opportunity to present any evidence it wished with respect to the clause. Both Sealy and Ohio introduced expert testimony directed to whether equitable relief was warranted, and if so, what type of relief would be appropriate.

Most of the equitable relief sought by Ohio was granted. However, Ohio appealed from the denial of relief with respect to the exclusive manufacturing territories clause. In the second appeal, *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, 74 L.Ed. 2d 201 (1982) ("Ohio II"), the Court of Appeals expressly held that Judge Parsons did not err in failing to enjoin the defend-

ants from enforcing the clause. At page 496 of Ohio II, the Court of Appeals stated:

> Ohio also claims that the District Court erred in failing to enjoin Sealy from enforcing its exclusive manufacturing territory clause. The District Court was required to enjoin enforcement of this clause only if necessary to prevent future allocation of sales markets. In our first decision in this case we noted that
>
> > The local nature of the mattress business and the exclusive manufacturing areas used by Sealy really do little more than set the stage for the balance of the restraints attacked. Any licensee could, e.g., engage in significant intrabrand competition at least with his neighboring licensees if Sealy's restraints went no further.
>
> 585 F.2d at 828. The District Court's decree enjoined Sealy from enforcing all the other challenged license restraints. In so doing, the District Court opened the market to permit at least 'significant intrabrand competition among neighboring licensees.' Of course, permitting Sealy to enforce the exclusive manufacturing clause may prevent Ohio from competing effectively in every APR [area of primary responsibility]. Our goal in framing an equitable decree, however, is not to ensure that Ohio attains every competitive advantage it seeks. Rather we seek only to ensure that our decree will restore intrabrand competition as a whole. We are convinced that the decree in this case would achieve this result.

It thus clearly appears that the issue of the exclusive manufacturing clause was also before the Court of Appeals after the hearing before Judge Parsons and that the Court of Appeals affirmed Judge Parsons' denial of relief in Ohio II.

Ohio was both entitled and required to present to Judge Parsons in the hearing which concluded on November 9, 1979, all of the facts which occurred between April 1975 and April 1978 bearing on its claim for equitable invalidation of the exclusive manufacturing clause. It is the situation which exists *at the time the decree is entered* which determines whether, and to what extent, equitable relief should be granted. "[A] court of equity is not restricted to an adjustment of the rights of the parties as they existed when suit was brought, but will give relief appropriate to events occurring pending the suit. 21 C.J. 137. 'Equity acts in the present tense,' and molds its 'decree to actualities not history.' *Continental Securities Co.* v. *Interborough Rapid Transit Co.*, . . . 207 F. 467, 471 [S.D.N.Y. 1913], affirmed, . . . 221 F. 44 [2d Cir. 1915]; 32 C.J. 76 § 63." *Champion Spark Plug Co.* v. *Reich*, 121 F.2d 769, 772 (8th Cir.), *cert. denied*, 314 U.S. 669 (1941). In other words, Judge Parsons had to examine the facts at the time of the second hearing on equitable relief to determine the nature and scope of the relief to be granted.

Practical considerations also reenforce the preclusion result which the rules of *res judicata* require. Ohio is asserting at this juncture in this case the identical claim for equitable relief which was previously submitted. It is also seeking the same kind of relief in the case of *Ohio-Sealy Mattress Manufacturing Co.* v. *Duncan*, No. 79 C 2741 ("the Duncan case"), which is pending before this Court, and Ohio will have the opportunity to show there that such equitable relief should be granted.

It is immaterial whether Judge Parsons based his rulings solely on pre-verdict evidence as Judge Aspen concluded in denying Sealy's motion for summary judgment on the theory of collateral estoppel, 545 F. Supp. 765 (N.D. Ill. 1982), or whether the post-verdict facts were actually litigated as Sealy contends. The decisive circumstance is that if such evidence was material to the claim presented, Ohio had the opportunity to have it considered. Had Judge Parsons refused to

consider post-verdict evidence, Ohio's remedy would have been to appeal. However, there is nothing in the Court of Appeals opinion in Ohio II to indicate that such a contention was ever made or considered by the Court of Appeals.

The present case is not one of those unusual instances where a prior judgment does not yield "a coherent disposition of the controversy" described in the Restatement (Second) of Judgments § 26(1) (f) as permitting an exception to the ordinary rules of claim preclusion. Upon examination of the opinions of the Court of Appeals and of this Court, and the various documents which have been filed in the case previously litigated, it clearly appears that the doctrine of *res judicata* applies and that summary judgment must be granted in favor of the defendants barring relitigation of the validity of the exclusive manufacturing territories clause in this case.

II. Pass-over Payment and Charges Claim

Paragraph 92(d) of the amended complaint asserts injury to Ohio consisting of net pass-over payments and warranty repair charges paid to Sealy. Ohio claims treble damages for this alleged injury. As previously stated, this Court has ruled that the relevant time period for damage claims in this action is April 3, 1975 through April 24, 1978. The total amount of net pass-over payments and warranty repair charges paid by Ohio during the relevant time period and for which damages could be claimed in this action is $228,151.00. The net amount of this claim has been established without dispute: $480,514.00 less $49,149.00 included in the judgment in Ohio I, less $203,214.00 paid by Ohio on September 22, 1978 and falling outside the damage period of this case and within the damage period of the Duncan case.

The trebled amount of the payments recoverable in this case is $684,453.00. This amount represents the maximum of damages Ohio could recover on the claim asserted in ¶ 49d (sic: 92(d)) of the amended complaint if liability were established. Sealy has previously repaid to Ohio $26,294.00 of the

foregoing amount. The balance, $658,159.00 is the maximum amount Ohio would be entitled to be repaid on the claim asserted in ¶ 92(d) of the amended complaint. Sealy tendered the amount of $658,159.00 to Ohio on February 1, 1983. Ohio refused the tender and has advanced reasons for its contention that it is entitled to additional sums of money (and it also noted that the check was drawn to Ohio-Sealy Mattress Co. rather than Ohio-Sealy Mattress Manufacturing Co.).

Ohio claims that it has suffered additional out-of-pocket losses as a result of Sealy's unlawful charges. Ohio claims that it has lost sales and resulting profits. It states that Sealy's unlawful levy on sales outside of its areas of primary responsibility placed Ohio at a competitive disadvantage with intra and interbrand competitors who were not required to make such payments. Ohio claims it lost $4,572,870.00 in profits during the relevant time period due to Sealy's illegal assessments.

The claim for lost profits on lost sales and for loss of use of funds is not a claim which Ohio has previously advanced in this case. Paragraph 92(d) of the amended complaint asserts no such claim. The recovery claimed is "net pass-over payments and warranty repair charges." It is completely clear from prior rulings of this Court that plaintiffs may not now assert any such new claim in this action. No such claim is asserted in any other allegation of the amended complaint or in the Schedule of Issues. This Court's ruling of February 4, 1981 expressly precludes the raising of any matters not presented in the Schedule of Issues. Further, this Court's ruling of February 27, 1981, rejected plaintiffs' attempt to amend the complaint further by adding additional damage claims even though such claims had been included by plaintiff in the Schedule of Issues. 90 F.R.D. 35, 36-37, 40, 43-44. All of the reasons stated by Judge Aspen for refusing to allow the addition of new elements of damages requires rejection of the contentions advanced for Ohio's refusal of the tender.

Ohio also urges that defendants' tender does not fully satisfy the claim in ¶92(d) because it does not include inter-

est. This claim is precluded as a matter of law. A plaintiff in a private antitrust suit is not entitled as part of a remedy to prejudgment interest, since the statute does not provide for it. Instead, damages are trebled. *See, e.g., Smith* v. *Pro-Football, Inc.*, 528 F. Supp. 1266, 1275 (D.D.C. 1981) (prejudgment interest in antitrust case, where damages are trebled by statute, not awarded). *And cf. Hodgson* v. *Miller Brewing Company*, 457 F. 2d 221, 229 (7th Cir. 1972) (under Fair Labor Standards Act, which doubles damages, award of interest is improper).

General Motors v. *Devex Corporation*, ___ U.S. ___, 51 U.S.L.W. 4613 (May 24, 1983), brought to the Court's attention by plaintiffs' counsel, is inapposite. *Devex* holds that prejudgment interest may be awarded in a patent infringement suit, in order "to afford the plaintiff full compensation for the infringment." *Id.* at 4614. But the patent laws do not provide for trebling damages. The Court finds that the automatic trebling provision provides full compensation for an injured party, and that awarding prejudgment interest on top of trebled damages would be improper. *See also Locklin* v. *Day-Glo Color Corporation*, 429 F.2d 873, 877 and see n.8 (7th Cir. 1970) (court distinguishes between patent and antitrust laws in denying prejudgment interest for violation of the latter).

Moreover, the 1980 amendment, Pub. L. No. 96-349 (Sept. 12, 1980), authorizing the award of discretionary interest under § 4 of the Clayton Act for post-complaint bad faith conduct by a defendant causing unnecessary delay of the proceedings is inapplicable since it applies only to actions commenced after its passage. 15 U.S.C. § 4 (b).

Finally, it is immaterial to the disposition of the instant motions whether Ohio will ultimately be entitled to any statutory award of attorneys' fees in this action. Any such claim is a separate claim from the damages sought in ¶92(d) and need not be resolved at this time.

Ohio's claim has become moot because of Sealy's tender. It is the tender itself which moots the claims, and the Court is powerless to review any abstract questions remaining after a plaintiff has refused to accept a tender of an amount that fully satisfies its claim.

In order to resolve any doubt about the validity of the tender (because the name of the plaintiff was incomplete on the check tendered), the Court will enter an order directing that a new tender be made within ten days, and on condition that such tender is spread of record by a proper filing with this Court, ¶92(d) will be dismissed as moot.

III. The Interlocking Directorate Claim

Count II of the amended complaint alleges claims for injunctive relief and damages based on § 8 of the Clayton Act which forbids interlocking directorates under specified circumstances. Pursuant to the Court's order of February 4, 1981, 90 F.R.D. at 40, defendants move for summary [judgment] on these claims.

Magistrate Cooley recommended that this issue of injunctive relief be resolved by entering the defendants' proposed injuction. The defendants now agree that the Court should dispose of Count II by entering defendants' proposed injunction.

At the time this action was filed and for many years prior thereto, the Board of Directors of Sealy, Inc. was composed primarily of representatives of Sealy licensees. Originally Sealy was solely a licensing company not itself engaged in manufacturing. Beginning in 1969, however, Sealy acquired the businesses of a number of its former licensees and those businesses became wholly-owned subsidiaries of Sealy. The § 8 violation alleged in the complaint was based on the fact that the directors of some of Sealy's licensees continued to serve on the Board of Sealy which, through its manufacturing subsidiaries, was alleged to have become a competitor of licensees within the meaning of § 8.

In 1978, it appears the composition of Sealy's board was changed to eliminate licensee representation. A new by-law adopted at that time forbids any director or officer or shareholder of any licensee from serving on Sealy's board. There has been no interlocking director on Sealy's board since April 24, 1978 when a new board was elected pursuant to the revised by-law. Subsequent to the foregoing change in Sealy's by-laws and the elimination of interlocking directors, equitable relief proceedings were pending before Judge Parsons in the prior related case, No. 71 C 1243. In those proceedings Ohio requested that the decree include an injunction restraining any officer, director or agent of a licensee from serving on the Board of Directors of any defendant. No such provision was included in Judge Parsons' final decree which has since been affirmed by the Court of Appeals.

The defendants have offered to consent to an injunction essentially identical with that previously proposed by plaintiff in case No. 71 C 1243, except for the addition of the words "as long as Sealy, Inc. owns and operates mattress manufacturing plants." That limitation is said to be appropriate because if Sealy were to cease owning and operating mattress manufacturing plants, the provisions of § 8 would not apply.

The injunction if entered would grant full prospective relief for any violation of § 8 that previously existed since it would wholly prevent the possible recurrence of such a violation. This disposition in favor of Ohio would render it unnecessary for the Court to consider the issues of mootness and collateral estoppel discussed in the magistrate's report, either of which if decided in defendants' favor would lead to summary judgment in favor of defendants on this aspect of Count II.

Defendants have argued that damages are not available for a violation of § 8. However, the Court need not determine the availability of the damages under § 8 if Ohio has recovered under § 1 all the damages it could claim under § 8. That appears to be the situation in this case. Count II of the amended complaint alleges as injury and damages under § 8

the same claims of injury and damages that were alleged in Count I under § 1 of the Sherman Act. Paragraph 104 of the amended complaint alleges that "as a direct and proximate result of the foregoing competition" Ohio-Sealy has been "damaged all as set forth in Count I." Count I has four claims for damages, paragraphs 92(a), (b), (c), and (d). The first three have been resolved against Ohio on the merits. This Court's ruling of August 1, 1980 eliminated the damage claims in paragraphs 92(a) and (b). 90 F.R.D. 11, 14-20. This Court's ruling on non-Sealy royalties in connection with its grant of defendants' motion for summary judgment on its counterclaim bars the claim stated in paragraph 92(c). 545 F. Supp. 765, 780-82. The Court's ruling of February 27, 1981 denying plaintiffs' motion for further amendment of the complaint also precludes plaintiff from asserting any additional claims for damages. 90 F.R.D. 40.

The recommendation of the magistrate and the concession of the defendants should be accepted and the proposed injunction should be entered substantially in the form as proposed by Ohio and Sealy. This disposition will render it unnecessary for the Court to consider the issues of antitrust injury and availability of damages raised by defendants and discussed in the magistrate's report.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

I. Summary judgment is granted in favor of the defendants and against the plaintiffs precluding the relitigation in this case of any issue relating to the validity of the exclusive manufacturing territories clause.

II. Defendants are directed to retender to plaintiffs $658,159.00, being the maximum amount trebled that plaintiffs are entitled to recover on account of pass-over payments and warranty repair charges. Upon spreading the tender of record, defendants may present an order reciting that this claim is dismissed as moot.

III. Defendants are hereby permanently enjoined and restrained from permitting any officer, director or majority shareholder of any Sealy licensee to serve as a member of the board of directors of Sealy, Inc. or any of its subsidiaries so long as Sealy, Inc. owns and operates mattress manufacturing plants.

No. 76 C 810

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,
Plaintiffs,

v.

MORRIS A. KAPLAN, ET AL.,
Defendants.

JUNE 30, 1980

FINAL JUDGMENT AND DECREE

HART, District Judge:

This cause having been heard on the various motions of the parties, and all matters in controversy having been disposed of by settlement or by the previous rulings of the Court dated respectively August 1, 1980, February 4, 1981, February 27, 1981, April 22, 1982, July 20, 1982, September 30, 1982, and June 16, 1983:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendants are permanently enjoined and restrained from permitting any officer, director or majority shareholder of any Sealy licensee to serve as a member of the board of directors of Sealy, Inc. or any of its subsidiaries so long as Sealy, Inc. owns and operates mattress manufacturing plants.

2. Consideration of any claim plaintiffs may have for the award of costs or attorney's fees in this action is postponed until after the conclusion of any appeal that may be taken from this judgment. The time limitations of General

Rule 45 of this Court shall not apply, except that plaintiffs shall file within 30 days data showing time expended and services rendered by each attorney who has participated in this matter since the filing of suit.

3. Inasmuch as it appears that the defendants have tendered to the plaintiffs the sum of $658,159.00, the plaintiffs' claim set forth in paragraph 92(d) of the Amended Complaint is hereby dismissed as moot.

4. Summary judgment is granted in favor of the defendants and against the plaintiffs precluding the relitigation in this case of any issue relating to the validity of the exclusive manufacturing territories clause for the reasons set forth in this Court's Opinion entered on June 16, 1983.

5. Defendant Sealy, Inc. recover of plaintiffs the sum of $358,143.00 on its Amended Counterclaim, together with interest thereon as provided by law. Execution of this money judgment is stayed by agreement of the parties without bond pending appeal.

Office-Supreme Court, U.S.
FILED
MAY 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1581

In The

Supreme Court of the United States

October Term, 1984

SEALY, INCORPORATED, ET AL.,

Petitioners,

v.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENTS PURSUANT TO RULES 21.1(b) and 28.1

Respondents Ohio-Sealy Mattress Manufacturing Company, Sealy Mattress Company of Houston, Sealy Mattress Company of Fort Worth, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, and Sealy Mattress Company of Georgia, and petitioners Morris A. Kaplan, Sealy Mattress Company of Illinois, William H. Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Company, Morton H. Yulman, Sealy of Eastern New York, Inc., Sealy of Minnesota, Inc., T. C. Englehardt, Jr., Fred G. Hodges Bedding Company, (a/k/a Sealy Mattress Company of Reading, PA.), Joseph R. Rudick, Maryland Bedding Company, Howard G. Haas, Sealy Spring Corporation, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., were parties to the proceedings in the Court of Appeals.

The Ohio-Sealy Mattress Manufacturing Company was restructured on July 11, 1984 and respondents became wholly-owned subsidiaries of The Ohio Mattress Company.

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No. 84-1581

In The

Supreme Court of the United States

October Term, 1984

SEALY, INCORPORATED, ET AL.,

Petitioners,

v.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In 1967 the Court held that Sealy's system of exclusive territories violated the antitrust laws. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Shortly after this Court's decision Sealy's licensee directors developed, in Sealy's own words, "ways and means of getting around the Supreme Court ruling in such a way as to be able to

retain the territorialization." Those "ways and means" included a monetary incentive encouraging each Sealy licensee to sell only in its own territory, a surcharge on sales outside a licensee's territory, a further "product service repair" charge on such sales, a plant location clause, exclusive manufacturing territories, and a right of first refusal. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 745 F.2d 441 (7th Cir. 1984). (A-3-4)*

In 1971 Ohio sued Sealy (*Ohio I*) alleging that this combination of restraints had the purpose and effect of maintaining the exclusive territories which the Court had held unlawful. In 1975 a jury found in Ohio's favor and awarded damages "to the time of trial." Sealy made no voluntary change as a result of this verdict and in 1977 the district court denied equitable relief. In 1978 the Court of Appeals affirmed the jury verdict and reversed the denial of equitable relief. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979). In 1981 the district court granted most of the equitable relief requested but denied Ohio's request for damages suffered during the six-year period between the jury verdict and the granting of equitable relief. In 1982 the Court of Appeals affirmed, holding that Ohio should seek post-verdict damages in a separate action. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 669 F.2d 490 (7th Cir. 1982).

Meanwhile, in 1976, Ohio had already filed such a separate action, the instant case (*Ohio II*). Ohio alleged

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* "A" references are to Appendix A of Sealy's Petition.

that Sealy had continued to maintain its unlawful combination of restraints and sought damages for the period following the 1975 jury verdict. In 1980 the district court held that Ohio should have sought those post-verdict damages from pre-verdict conduct in the prior case (*Ohio I*). *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 90 F.R.D. 11, 15 (N.D. Ill. 1980). (B-8)* In 1984 the Court of Appeals reversed, holding that the accrual of future damages had been speculative at the time of the 1975 jury verdict. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan,* 745 F.2d 441 (7th Cir. 1984).

> At the time Ohio asked the jury to assess damages in *Ohio I,* Ohio was entitled to believe that Sealy would in the future obey the nation's antitrust laws. That is, Ohio could proceed under the assumption that, in the event of a verdict in Ohio's favor, Sealy would open its territories to reasonable intrabrand competition from neighboring licensees. Judge Aspen was correct when he stated that at the time of trial Ohio could not have expected Sealy to hand the Philadelphia, Florida, and Pittsburgh licenses over to Ohio in the event the jury returned a verdict against Sealy. Judge Aspen, however, erred when he ignored all the other tricks, gambits, and ploys Sealy allegedly continued to use after April 1975 to seal off its territories from reasonable intra-brand competition.

Id. at 450. (A-14)

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* "B" references are to Appendix B of Sealy's Petition.

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REASONS FOR DENYING THE WRIT

I. Sealy's Petition Ignores The Court's Decision In Lawlor.

Sealy contends that the Court of Appeals' decision is in conflict with the principles of *res judicata*. Sealy ignores the fact, however, that the Court of Appeals' decision is consistent with, and was based on the Court's decision in *Lawlor v. National Screen Services Corp.*, 349 U.S. 322 (1955).

In *Lawlor*, plaintiffs filed an antitrust suit in 1942, seeking treble damages and injunctive relief. The complaint alleged that the defendants had conspired to monopolize the distribution of motion picture advertising materials. The suit was settled in 1943 and the trial court dismissed the suit with prejudice.

In 1949, plaintiffs filed another antitrust action. The complaint alleged that the settlement of the 1942 suit was merely a device to perpetuate defendants' conspiracy, and that the defendants had engaged in additional behavior aimed at destroying plaintiffs' business. Plaintiffs sought damages for injuries arising subsequent to the dismissal of the 1942 suit.

The defendants filed a motion to dismiss, claiming that the judgment in the 1942 action was *res judicata*. The district court granted the motion, and dismissed the action.

The Court of Appeals defined the issue before it as "whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942." *Lawlor v. National Screen Service Corp.*, 211 F.2d 934, 935 (3d Cir. 1954), *rev'd on other grounds*, 349 U.S. 322 (1955). The court determined that because

the two suits were based on "essentially the same course of wrongful conduct," they constitute the "same cause of action." Id. at 936. Accordingly, the court held that the 1949 suit was barred by the judgment dismissing the 1942 suit, and affirmed the district court's decision.

The Court granted certiorari and reversed, concluding that the 1942 and 1949 suits were not based on the same cause of action:

> That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct — for example, an abatable nuisance — may frequently give rise to more than a single cause of action.

349 U.S. at 327-28. The Court also noted that "[a]ntitrust violations are expressly made abatable." *Id.* at 328, n.13. The judgment in the 1942 action did not constitute a bar to the 1949 suit regardless of "whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort." *Id.* at 328.

In the instant action, the Court of Appeals held that Ohio could sue for post-verdict damages arising from pre-verdict conduct because the post-verdict damages were integrally tied to other post-verdict conduct, citing *Lawlor:*

> This is an unusual case in that Sealy's liability in 1975 for its wrongful acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and denial of a new plant location in Toledo depended directly upon Sealy's enforcement of other contract provisions that effectively sealed off Philadelphia, Florida, Pittsburgh, and the out-of-APR territory around Toledo from intrabrand competition. The post-verdict damages that Ohio now seeks are thus not, as Sealy would have us believe, "continuing damages for *old* and *now insulated,* illegal conduct." *Exhibitor's Poster Ex-*

> *change, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1319 (5th Cir. 1970) (emphasis by the Seventh Circuit). The post-verdict damages sought in *Ohio II* necessarily required for their accrual Sealy's alleged maintenance of the host of other devices that insured the APR's in question would remain enclaves untroubled by competition from Ohio. Ohio was not required to predict that these devices would remain in place following the 1975 verdict. A contrary conclusion on our part would in effect confer on defendants immunity from civil liability for their post-verdict maintenance of barriers around Philadelphia, Florida, Pittsburgh, and the out-of-APR territories surrounding Toledo. See *Lawlor, supra,* 349 U.S. at 329, 75 S. Ct. at 869.

Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d at 450. (A-17-18)

Sealy's petition ignores the *Lawlor* decision as well as the Court of Appeals' application of *Lawlor* to the instant case.

II. Sealy's Petition Ignores The Court Of Appeals' Application Of The Court's Holding In Zenith Radio Corp. v. Hazeltine Research, Inc.

The Court of Appeals' decision relies heavily upon the Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). In its petition for certiorari, Sealy pays lip service to *Zenith,* but completely ignores the Court of Appeals' application of that case to the instant action.

In *Zenith,* the Court stated the basic principle that when a cause of action accrues, a plaintiff is entitled to sue not only for past damages, but for future damages as well:

> [E]ach separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.

Id. at 338-39. This principle was also recognized by the Court of Appeals in the instant action 745 F.2d at 448 (A-12), and similar dicta was cited by Sealy (Petition, p. 7). The Court further stated, however, that a party is not required to sue for future damages when such damages are unprovable:

> [I]t is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable *if the fact of their accrual is speculative or their amount and nature unprovable.*

Id. at 339 (emphasis added). The Court of Appeals applied this language:

> The accrual of future damages resulting from the acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and the denial of a Toledo plant *was speculative at the time of the 1975 jury verdict.*

745 F.2d at 448-49. (A-17) (emphasis added).

The principles of *res judicata* as articulated in *Zenith* and applied by the Court of Appeals in the instant action are ignored by Sealy. Because the Court of Appeal's decision is consistent with *Zenith,* the petition for certiorari should be denied.

III. The Court Below Correctly Applied The Doctrine Of Res Judicata.

When a plaintiff is harmed by a wrong which is of a continuing nature, the doctrine of *res judicata* does not preclude that party from suing once for damages incurred to the time of trial, and then suing again for subsequent damages if the defendant fails to cure the wrong. According to the *Restatement (Second) Judgments:*

> For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit...

§ 26(e), p. 234 (1982).

This principle, that successive actions may be brought for "continuing" wrongs, is well founded in the doctrine of nuisance law. A plaintiff is entitled to bring successive actions when a defendant fails to terminate an abatable nuisance. *See e.g., Rebel v. Big Tarkio Drainage District,* 602 S.W.2d 787, 792 (Mo. App. 1980); *Bartlett v. Grasselli Chemical Co.,* 92 W.Va. 445, 115 S.E. 451, 453 (1922); *Conestee Mills v. City of Greenville,* 160 S.C. 10, 158 S.E. 113, 116 (1931); *Hollenbeck v. City of Marion,* 116 Iowa 69, 89 N.W. 210, 212 (1902); *Spaulding v. Cameron,* 38 Cal. 2d 265, 268, 239 P.2d 625, 628 (1952); *Reynolds Metals Co. v. Wand,* 308 F.2d 504, 509-10 (9th Cir. 1962); *Restatement of Torts 2d,* § 930 (1977); *McCormick on Damages,* § 127, p. 511 (1935); and Dobbs, *Handbook on the Law of Remedies,* § 5.4, pp. 335-37 (1973).

Indeed, courts have held that it is reversible error to award future damages arising from an abatable nuisance

without first giving the wrongdoer an opportunity to discontinue or remedy the nuisance. *See e.g., Uline v. New York Central & H.R.R.* Co., 101 N.Y. 98, 4 N.E. 536, 552 (1886); *Bowers v. Mississippi & R.R. Boom Co.*, 78 Minn. 398, 81 N.W. 208, 209 (1899); *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N.E. 693, 696 (1892); *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N.E. 229, 230 (1891).

The principle that a party may bring successive actions for a continuing wrong has direct application to antitrust actions. As discussed *supra*, the Court specifically stated in *Lawlor* that "an abatable nuisance . . . may frequently give rise to more than a single cause of action," and that "[a]ntitrust violations are expressly made abatable." 349 U.S. at 327-328, n.13.

In the instant action, the Court of Appeals recognized that Ohio had no way of knowing at the time of the jury trial in *Ohio I* that Sealy would fail to abate its anticompetitive conduct:

> Ohio was perfectly correct to proceed under the assumption that Sealy would discontinue those tactics following an award in Ohio's favor that indicated the jury necessarily found a horizontal division of markets. It would have been absurd for Ohio to argue to the jury in 1975 that it would continue to feel antitrust injury from Sealy's acquisitions and denial of a Toledo plant location well into the future. That Sealy would not dismantle its barriers to reasonable intrabrand competition following a verdict for Ohio was highly speculative, and Ohio accordingly cannot be barred from bringing its current damages action.

745 F.2d at 450. (A-17)

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CONCLUSION

Sealy's petition ignores the principles of *res judicata* as applied by the Court of Appeals. Because the Court of Appeals' decision is entirely consistent with decisions of the Court applying principles of *res judicata,* the petition should be denied.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent Ohio's defense now to the claim of *res judicata* is that at the trial of the 1971 case (*Ohio I*), its future damages were speculative. Yet at that trial Ohio offered no evidence of future damages. Nor did it obtain or even ask the trial court for a ruling that such damages were in fact speculative. Instead Ohio pressed for injunctive relief and damages to the time of trial, both of which it ultimately received. In that case, "Ohio admit[ted] that it made a 'litigation choice' when it filed this suit not to seek future damages caused by Sealy's pre-verdict antitrust conduct." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir. 1982).

Ohio then initiated a series of new cases, one filed in 1976 (*Ohio II*), now before this Court, another filed in 1979 (*Ohio III*) and still another filed in 1982 (*Ohio IV*). When petitioner Sealy attacked the 1979 case on the ground that the 1976 case

was "another action pending," Ohio limited its damages in *Ohio II* to the period from the verdict in *Ohio I* to the filing of *Ohio III*. As a result, there are now four cases arising out of the same facts.

If the doctrine of *res judicata* has any effective force, it must apply in these circumstances. And if the federal courts are to maintain control over the proliferation of litigation, Ohio should be barred from further claims for pre-verdict conduct fully compensated in *Ohio I*.

The issue is not whether Ohio could sue Sealy for any post-verdict repetitions or continuations of pre-verdict conduct. It could, and it did. This case originally involved two kinds of conduct—pre-verdict and post-verdict. The district court adjudicated all the claims for post-verdict acts and its rulings were not appealed. The issue now here is solely whether a plaintiff can reopen a previous final judgment in a second action, or series of successive actions, merely by joining new acts in its pleading seeking additional damages for the acts already adjudicated.

The acts for which Ohio is seeking recovery here in *Ohio II* are petitioner Sealy's retention of specified franchises for itself and failure to make these franchises available to Ohio. It was for this very claim that Ohio received its multi-million dollar damage award in *Ohio I*. In *Ohio I*, the court of appeals affirmed the denial of equitable relief which would have caused Sealy to surrender the franchises in question.

In its brief in opposition, Ohio seeks to avoid the manifest mandate of this Court's ruling in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981) (Pet. Cert., pp. 5-7), by ignoring it. The *Moitie* case is not even cited in the brief in opposition. And respondent makes no attempt to defend the unprecedented "exception" to the doctrine of *res judicata* that the decision below creates—an exception that wholly undermines the policies against relitigation that this Court's decision in *Moitie* requires federal courts to enforce. (The

"exception" would permit reopening the *Moitie* judgment itself by pleading new acts as a continuation of the conduct barred by the first judgment.)

Instead, Ohio invokes but distorts two earlier decisions of this Court. *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322 (1955); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Its argument simply ignores—as did the court below—the distinction made in *Lawlor* between "continuing" acts and completed ones and that *Zenith* made between acts that were barred by the statute of limitations and those occurring before the statute had run. (In so doing, the court of appeals also created a conflict with the Fifth Circuit in construing the *Lawlor* and *Zenith* cases. *See* cases cited in the Petition for Certiorari at pp. 6 and 7.)

The decision below is squarely in conflict with the *Lawlor* opinion. Ohio's quotation of the opinion (Br. in Opp., p. 5) studiously omits the crucial passage immediately following the part quoted, in which this Court stated:

> The conduct presently complained of was all subsequent to the 1943 judgment. . . . While the 1943 judgment *precludes recovery on claims arising prior to its entry*, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

(349 U.S. at 328. Emphasis added.) And since Ohio in this case did sue upon, and did recover for, the post-verdict conduct it complained of, the application of *res judicata* could not confer any "immunity from civil liability for future violations." 349 U.S. at 329. The fact that the court of appeals declined to award divestiture of Sealy's franchises is conclusive that the retention of those franchises is not a continuing or repeated tort analogous to an "abatable nuisance." Neither *Lawlor* nor the "nuisance" law cited by Ohio (Br. in Opp., p. 5) can support the court of appeals' rejection of settled rules of *res judicata*.

Nor does this case involve the "speculative" damages involved in *Zenith*. *Zenith* involved a claim that was never adjudicated because at the time of the unlawful acts in question, the future results of the acts were speculative. In the case at bar, at the time of the acquisitions in issue, it was known that the acquisitions were complete and that Ohio would never receive profits from the acquisitions it lost. Thus, its damages were not speculative. The court below held, however, that new acts after the conclusion of the litigation revived the claim for lost ownership profit damages for these acquisitions. Thus, Ohio may seek the exact same damages in a second suit that it could have sought in the first suit but chose not to for tactical reasons. *Zenith* does not envision a new cause of action under this circumstance.

Indeed, to permit the litigation of Ohio's damage claim under the "speculative damage" exception would pervert that exception. If Ohio failed to prove future damages because it assumed that the franchises would be turned over to Ohio, Ohio made a "calculated choice," *Moitie*, 452 U.S. at 401, "a deliberate tactical decision," *id.* at 403, by which it is bound. The damages for depriving Ohio of the franchises were no more "speculative" than any damages based on losses past, present, and future, resulting from a completed illegal act. Every damage award in a contract case, most in personal injury cases, and all in antitrust suits, must be deemed "speculative" if the damages here can be so treated. Every such case would then be subject to being reopened, perhaps not only by the plaintiff but by the defendant who might prove that the damages awarded turned out to be excessive.

The decision below was plainly in error. More important, however, the error is a rejection of this Court's position in *Moitie*. The "exception" to the principle of *res judicata* created by the court of appeals—that the doctrine does not apply when claims for new acts are pleaded along with adjudicated old ones—threatens an inundation of the federal courts with

revived claims that have been fully adjudicated, creating endless litigation in antitrust cases and other cases as well.

This Court should grant certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

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